The Acts of June 11, 1840 and April 29, 1844, aforementioned, were not restricted to "banks"; therefore trust companies were covered by their provisions. The acts subsequent to these, which we have referred to, were restricted to "banks and savings institutions." The change made by the Act of February 23, 1866, supra, with respect to banks, did not apply to trust companies. Trust companies were left subject to a capital stock tax. This situation continued until the Act of June 30, 1885, a supplement to the Act of 1879, as previously referred to. This act (Sec. 2) was extended to "all shares of stock in any bank, banking or saving institution or company, safe deposit, guarantee, surety and real estate, title insurance or trust company * * *". Trust companies could thereafter elect to collect the tax from their shareholders, and by so doing became exempt from all other taxation, which meant capital stock tax.

Under the Act of June 1, 1889, supra, trust companies were again left to pay a capital stock tax, because that act restricted the election above referred to, to banks and savings institutions. The act reverted to the original status of taxation of trust companies. Likewise, the Acts of June 8, 1891 and July 15, 1897, supra, were restricted to banks.

The Act of June 13, 1907, P. L. 640, expressly provided for the taxation of the shares of stock of "title insurance or trust companies." This act (with its amendments) is the important act for consideration in this case. After providing that every title insurance, or trust, company, incorporated under a certain

Pennsylvania act, shall each year on or before the 20th day of June, make a report to the Auditor General, "setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided," it imposed the duty on the Auditor General:

> "* * * **to assess such shares** for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares * * *". (Boldface ours)

The Auditor General is given the right, if he is not satisfied of the correctness of the report made to him "on the question of the value of the shares of stock of such company," to examine into the evidence presented. It is further provided that after the Auditor General shall have fixed **"the value of the shares of stock of any such company"** as provided, and has settled an account according to law, he shall transmit to the president, cashier or treasurer of such company, a copy of such settlement of the tax due the Commonwealth **"on all such shares"**. Thereupon, it becomes the duty of the president, secretary or treasurer to post the same in a conspicuous place in such company's place of business **"so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of valuation of such shares of stock,** at

the Auditor General's office, within a period of thirty days from the date of such settlement."

It is the duty of the company, within forty days after the settlement, "at its option," to pay said tax "from its general fund, or collect the same from its shareholders and pay over to the State Treasurer." If the company falls or refuses to make such report, or to pay such tax, the Auditor General is required "after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain," to add fifty per centum as a penalty to the tax and collect it from the company. Further, if the president, cashier or treasurer of the company neglects or refuses to post the required notice, such officer is to be adjudged to be in default and as a penalty therefor, "such company shall be responsible to the Commonwealth for the amount of the tax assessed against the stockholders of such company."

It further provided an optional or alternative method of ascertaining and fixing the value of the shares for the purposes of this tax, in the event the company collected and paid the same on or before March 1st in each year, as follows:

> "* * * In case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested

> **in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,** and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth." (Boldface ours)

Although the Act of 1907 speaks in the title and in the body of the act of the tax imposed as a tax on shares, it is admitted that this fact alone does not determine the nature of the tax. However, from the brief details of the act just given, it will readily be seen that at each step in the reporting, ascertaining, fixing and collecting of the tax, we are dealing with a tax on shares.

In COMMONWEALTH v. MORTGAGE TRUST CO., 227 Pa. 163 (1910), the Supreme Court said at page 175:

> "* * * The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed. They made their reports to the auditor general under the general revenue acts of 1879, 1889 and 1891, and other statutes, just as other private corporations did, and the valuation of their capital stock was ascertained and the tax settlement made upon the same basis. This method of taxing the capital stock of these institutions continued in force until the act of 1907 was passed. As the trust company

> business grew in magnitude, as it did grow after the passage of the act of 1895 which conferred quasi banking privileges, the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks. * * *"

The Act of 1907 was first amended by the Act of July 11, 1923, P. L. 1071. This act, among other things, changed the time of the filing of the report, and the date for the ascertainment of the value of the shares was made "as of December 31 preceding." Relative to ascertaining and fixing the tax it provided that the duty of the Auditor General should be

> "* * * to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together *so much of* the amount of capital stock paid in, the surplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares. * * *" (Italics ours)

The italicized are amendments of the Act of 1907 made by the Act of 1923. The other amendments were minor and have no bearing on the questions involved.

The Act of 1907 was again amended by the Act of May 7, 1927, P. L. 853. This act amended the pro-

vision above quoted in the Act of 1923 by adding the words "or relieved from the payment of capital stock tax" following the words "liable to pay to the Commonwealth a capital stock tax."

The Act of 1907 was also specially amended by the Act of April 25, 1929, P. L. 673, by changing the time for the filing of the reports and by substituting "Department of Revenue" wherever "Auditor General" had appeared in the old Act of 1907 as amended. An amendment was also made by striking out the provision requiring the Auditor General (now Secretary of Revenue), after making his settlement, to transmit to the president, secretary, or treasurer of such company, a copy of such settlement showing the valuation and assessment so made and the amount of the tax due the Commonwealth, and thereupon making it the duty of said president, secretary, or treasurer to immediately post the same in a conspicuous place in such company's place of business so as to give notice to the shareholders of such valuation, and requiring the Auditor General (now Secretary of Revenue) to hear any shareholders on the subject of the valuation of such shares during a period of thirty (30) days from date of settlement. These provisions were stricken out because they were incorporated in Section 807, of The Fiscal Code of April 9, 1929, P. L. 343. The Act of April 25, 1929 amended the Act of 1907 by striking therefrom the proviso which had to do with the failure or refusal of the trust company to make the report required, and also the proviso which had to do with the requirement placed upon the president, secretary, or treasurer of the company to

post the notice of the settlement as aforementioned. These two latter provisos were also stricken out because they were incorporated in Section 1705 of The Fiscal Code of 1929.

Thus the Act of 1907 and its amendments fully provided for an assessment of a tax against the shares and the payment of the tax by the company from its general fund or collection by it from its stockholders, —as in the case of the tax on shares of bank stock. Accordingly, while from 1889 to 1907 banks and trust companies diverged with respect to stock taxes, the Act of 1907 and its amendments have substantially brought them together again.

The history of much of this legislation was also traced by Mr. Justice Elkin in COMMONWEALTH v. MORTGAGE TRUST COMPANY, 227 Pa. 163 (1910).

(c) Act of 1907, as amended, Provides for a Tax on the Shareholders, Not on the Capital Stock or Property of the Trust Company. It Charges the Company as Collector Only

Although the tax on bank stock started out as a capital stock tax, since the Act of February 23, 1866, previously referred to, the tax has consistently been assessable on the shares of stock in the hands of the stockholder. The Act of 1891 provided an alternative method whereby any bank or savings institution incorporated by this State or by the Federal Government, could collect from the shareholders and pay into the State Treasury a tax of eight mills on the

par value of its shares in lieu of all taxation except upon its real estate; upon failure so to elect to pay a tax upon the par value of the shares, it was made subject to a tax of four mills on the actual value of its shares of capital stock, without any exemption. As pointed out by Mr. Justice Elkin in COMMONWEALTH v. MORTGAGE TRUST COMPANY, supra, notwithstanding the inequalities that appear in this, the United States Supreme Court held this tax to be constitutional as a tax on shares in MERCHANTS' & MANUFACTURERS' NATIONAL BANK OF PITTSBURGH v. PENNSYLVANIA, 167 U. S. 461 (1896), affirming 168 Pa. 309. The following language of the United States Supreme Court in that case, at page 465, is pertinent:

> "It is further insisted that the act is really one taxing the bank, and not taxing the shares of stock as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. The language of section 7 in this respect is clear, for it provides that the national bank which fails to elect to collect and pay the 8 mills shall make a report to the auditor general 'setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation,' * * *"

Likewise, with respect to trust companies, between 1885 and 1889, and from 1907 to the present time, the tax has been assessable on the shares of stock in the hands of the stockholders. None of the acts, since the tax was assessed on the shares, contained any pro-

visions for collection, upon failure to pay, out of the general funds of the bank or trust company. On any such failure the State officials are to settle accounts with the shareholders.

The only legislative provisions for such taxes to become liens, upon nonpayment, were contained in the Act of 1844, supra, which provided for subjection of the property of the corporation to levy; but this is of no importance, because the tax was then still a capital stock tax. The Act of 1868, supra, which is still in force, provides that the tax shall become a lien on the shares (72 PS Sec. 1971).

The Act of 1897, supra, did impose on the bank a penalty of ten percent of the tax for failure to make a return. But, as Mr. John G. Johnson pointed out in his argument in PENNA. CO. ETC. v. COMMONWEALTH, 22 W. N. C. 340 (1888), that must have been a mistake of the draftsman of the act, because in fact the act imposed no tax on the bank. He also pointed out another error in drafting the act; the date of return of names of the individual stockholders was made to precede the date of election of the bank to pay the tax or collect from its stockholders. In support of his contention that these were errors, he pointed out that both were speedily corrected by the Act of 1881. Thereafter, no penalties were imposed on the banks for the obvious reason, as indicated by Mr. Johnson, that the tax was not imposed on the bank itself but on the shares of stock in the hands of the holders.

The tax in question here is a tax assessed against the property of the individual and not against the

corporation or property of the corporation. This has been decided in connection with attempts of trust companies to deduct the amount of the tax from their assets in ascertaining their net taxable income under Federal taxation laws: NORTHERN TRUST Co. v. McCOACH, 215 Fed. 991 (1914).

The court in that case in discussing the Trust Company Act of 1907 saying that the tax imposed by the State of Pennsylvania, by the act of assembly referred to is a tax imposed upon the property of the individual stockholders and not upon the corporation or its property and because of this, the amount of payment is not to be deducted from the gross income of the corporation in determining the taxable net income.

In HOME SAVINGS BANK v. DES MOINES, 205 U. S. 503 (1907), the United States Supreme Court in discussing a tax upon the owners of the shares of stock in a corporation, said (p. 518):

"* * * The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, **either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another, at his request, can recover the amount from him.** First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Merchants' & M. Nat.

> Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holdings of stock; and an examination of them shows that in every case the tax was assessed upon the property of the shareholders, and not upon the property of the corporation. * * *" (Boldface ours)

Pennsylvania does not require its banks and trust companies to advance the tax. It gives the corporation an option of either (a) collecting the tax from its shareholders or (b) paying the amount from its own funds. If it does not choose to pay the tax, the corporation has the responsibility of collecting it. The exercise of the option by the trust company to pay the tax makes the tax imposed no less a tax on shares in the hands of the shareholders. The option in the act "is strictly an option of payment not of obligation": NORTHERN TRUST COMPANY v. MCCOACH, 215 Fed. 991, 994 (1914).

A tax on shares is not a tax on the capital stock property, or franchises of a corporation. It is in no sense a tax on the corporation. It is a personal levy on the shareholders, based on the value of their stock as ascertained by a definite method prescribed in the Act of Assembly, and without any intent to reach the property that gives the stock its value: NORTHERN TRUST COMPANY v. MCCOACH, 215 Fed. 991 (1914); COMMONWEALTH v. UNION TRUST CO., 237 Pa. 353 (1912); COMMONWEALTH v. MORTGAGE TRUST CO., 227 Pa. 163 (1910).

Capital stock represents the property in which it is invested, so is taxable to the corporation which holds title to the property. COMMONWEALTH v. STANDARD OIL Co., 101 Pa. 119 (1882). The shares, on the other hand, are evidences of a right to participate in the profits of a corporation, and, upon its dissolution, to participate in the division of its assets: COMMONWEALTH v. FALL BROOK COAL Co., 156 Pa. 488 (1893); VAN ALLEN v. NOLAN, 70 U. S. 573 (1866). The capital stock and the shares are different subjects of taxation, and are owned by different entities: COMMONWEALTH v. STANDARD OIL Co., supra; WILKES-BARRE DEPOSIT & SAVINGS BANK v. WILKES-BARRE, 148 Pa. 601 (1892); NEILER & WARREN v. KELLY, 69 Pa. 403 (1871); COMMONWEALTH v. CURTIS PUBLISHING Co., 237 Pa. 333 (1912); FARRINGTON v. TENNESSEE, 95 U. S. 686 (1877).

The character of the tax as a levy upon the property of the shareholders was well understood by the legislature, and it was careful that the impost should not fail for violation of any of their constitutional rights. Thus it was provided that notice to shareholders should be given by the posting of notice of assessment in the company's place of business,—this, to afford process of law. It is also provided, as previously mentioned, that the Auditor General (now the Secretary of Revenue) shall give a hearing to any stockholder who wishes to protest the assessment made. These provisions were formerly in the Act of 1907 itself, but being matters of procedure, they were later incorporated in Section 807 of The Fiscal Code of April 9, 1929, P. L. 343.

If this were a tax on the property of a corporation, then why should the act provide that notice to shareholders should be given by posting of the notice of assessment in the company's place of business? This we believe is done to the end of due process of law.

Consequently, the conclusion of the court below that the tax in question under the Act of 1907, as amended by the Acts of 1923, 1927 and 1929 is a tax on shares in the hands of the shareholders and is fully supported by the decided cases.

III. Deduction Need not be Made for United States Bonds, Philippine Island Bonds and Joint Stock Land Bank Bonds.

In the consideration of the questions raised by the appellant in its assignments of error, we submit that it must be borne in mind that the fundamental questions raised must be based upon objections specifically set forth in the appeal from the settlement—in this case, resettlement, filed by the appellant. It is unnecessary to cite the authorities in support of the specific provisions of Section 11 of the Act of March 30, 1811, 5 Sm. L. 228, and now in Section 1104 of The Fiscal Code of 1929, P. L. 343, that only those objections which have been definitely raised by the appellant in its appeal in the court below can be considered by the court.

With this in mind, the attention of this court is directed to Specifications of Objection Numbers 1 to 6, both inclusive, (R. 5-6-7), which raise the following

question: Must the value of United States securities, Philippine Island bonds and Joint Stock Land Bank bonds be excluded in arriving at the actual value of the shares of a trust company subject to tax under the provisions of the Act of 1907, as last amended by the Act of 1929? This question appears to be covered specifically by assignments of error numbers 3, 4, 5, 7, 9 (R. 110-114).

The Commonwealth concedes that for the purposes of this case Philippine Island bonds and Joint Stock Land Bank bonds are in the same category as United States Government bonds. Therefore we shall refer to them all as United States Government securities in this argument.

The courts have uniformly held that in assessing the shares of stock of national and state banks and trust companies for taxation to the shareholders, no deduction need be made on account of securities of the United States which are part of the assets of the bank or trust company, since the shares are property of the shareholders and are distinct from the corporate assets. We shall refer only to some of the leading cases on this subject.

Taxation of national banks was limited by the National Bank Act of 1864, as amended by the Act of Congress of February 10, 1868, U. S. Rev. Stats. Sec. 5219, 11 U. S. C. A. Sec. 548, to taxation of the interest of the shareholder, and at a rate not greater than is assessed on other moneyed capital in the hands of individual citizens of such state.

One of the most important cases on the right of a state to authorize the taxation of shares of national banks whose capital either wholly or in part is invested in United States securities is VAN ALLEN v. NOLAN, 70 U. S. 573 (1866). In that case, the Supreme Court of the United States in an opinion by Mr. Justice Nelson said at pages 583 and 584:

> "But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. * * *
>
> "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed, as will be seen in referring to it."

and at page 588:

> "This is an answer to the argument that the term, as used here, means only the interest of

the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government; and that the state assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction." (Boldface ours)

In FIRST NATIONAL BANK OF LOUISVILLE v. KENTUCKY, 9 Wall. 353 (1870), the question arose whether under the law of Kentucky a tax was imposed on the shares of the bank or on the capital of the bank, which was all invested in government bonds. The Kentucky act imposed a tax on bank stock at the rate of fifty cents on each share, equal to $100 of stock therein owned by individuals, corporations or societies. Mr. Justice Miller, speaking for the Supreme Court said, at page 359:

"* * * it has been established as the law governing this court that the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the States, or in bonds and mortgages. In what-

ever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be [fol. 60] taxed as the owner of such securities."

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the States on stock or shares so held by them, **although all the capital of the bank be invested in federal securities,** provided the taxation does not violate the rule prescribed by the Act of 1864." (Boldface ours)

And at pages 360 and 361:

"But it is strongly urged that it is to be deemed a tax on the capital of the Bank; because the law requires the officers of the Bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State, of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax

upon the shares of the stockholders. If the State cannot require of the Bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some Act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject."

And again at page 363:

"* * * But we are of opinion that while Congress intended to limit state taxation to the shares of the Bank, as distinguished from its capital, and to provide against a discrimination in taxing such Bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secured the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

In CLEVELAND TRUST CO. v. LANDER, 184 U. S. 111, (1902), an Ohio statute imposed a tax on the shares of a trust company. The company claimed the right to deduct from the value of the shares the amount of the capital stock invested in United States bonds, and it

contended that shares of trust companies were entitled to a greater immunity from taxation than Section 5219 of the Revised Statutes of the United States gives to shares of national banks. The court, said, at page 113:

> "The argument of the plaintiff in error claims a greater immunity from taxation for the shares of the trust company than Sec. 5219 of the Revised Statutes of the United States gives to shares in national banks. * * *"

And again at page 115:

> "* * * The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (Sec. 5219) by another (Sec. 3701), between which there is no want of harmony. And what the Constitution of the state of Ohio requires, or what the statutes of the state require as to taxation, must be left to be decided by the supreme court of the state, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfies the Constitution of the state as a tax on the corporation, is not open to our review or objection. * * *"

In Des Moines National Bank v. Fairweather, 263 U. S. 103 (1923), supra it was held:

> "The mere fact that the capital, surplus, and undivided earnings of a bank are made the measure of value of the shares for taxation, and that the bank is required primarily [fol. 63] to pay the tax on the shares, does not show that the

assessment is upon the property of the bank rather than upon the stockholders' shares.

"The fact that, in fixing the value of shares of bank stock for purposes of taxation, the value of the capital, shares, and undivided earnings of the bank is made the basis, without deducting the value of United States securities or stock in Federal reserve banks held by the bank, does not constitute an illegal tax on such securities."

See also PEOPLES' NAT. BANK OF KINGFISHER v. BOARD OF EQUALIZATION, 260 U. S. 702 (1922); EDUCATIONAL FILM CORPORATION OF AMERICA v. WARD, 282 U. S. 379, 390 (1930); PACIFIC CO., LTD. v. JOHNSON, 285 U. S. 480 (1932).

In HOME SAVINGS BANK v. DES MOINES, 205 U. S. 503 (1907), plaintiffs in error were banking institutions incorporated under the laws of Iowa. The tax in question was levied under a law which provided that "Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of State and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders * * *."

It also provided that "The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporations in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner

as other taxes, or by an action in the name of the county * * *."

The United States Supreme Court, after quoting these provisions said (p. 511):

> "* * * The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. **These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt,** and, unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks. The fair interpretation of the law is that the taxes are upon the property of the banks. * * *" (Boldface ours)

Consequently it was held to be error to tax the United States bonds. After referring to FIRST NATIONAL BANK v. KENTUCKY, supra, MERCHANTS' & MANUFACTURERS' NATIONAL BANK v. PENNSYLVANIA, supra, and other cases, the court said that the theory sustaining these cases is that "the tax was not upon the corporations' holdings of bonds but on the shareholders' holdings of stock." So, in the present case, the tax being clearly assessed upon the shareholders, the appellant is not entitled to any deduction for the United States securities, Philippine Island bonds, and Joint Stock Land Bank bonds owned by it.

The Court in HOME SAVINGS BANK v. DES MOINES, 205 U. S. 503, in distinguishing the tax as assessed

against the corporation from a tax assessed against the shareholders said at page 516:

> "* * * Although the states may not, in any form, levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and, in valuing the shares for the purposes of taxation, is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. The right to tax the shares of national banks arises by congressional authority, but the right to tax shares of state banks exists independently of any such authority, for the state requires no leave to tax the holdings in its own corporations. The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. * * *"

And page 518:

> "The Van Allen Case has settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock, is not a tax upon United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the power inherent in the state to tax the shares of such corporation. * * *"

IV. The Market Value of the Shares of Stock Owned by Appellant in Other Corporations, is Not the Basis of Deduction for Determination of the Tax in the Act of 1907, as Amended.

(a) Deduction provided for by Act of 1907, as amended.

It is contended by the appellant that the market value of the shares of stock of other corporations, to wit, $155,989, owned by the appellant, should have been deducted from the value of the total assets of the appellant. This contention of the appellant is predicated on the theory that the tax imposed by the Act of 1907 as last amended by the Act of 1929 imposes a tax on it and not on its shareholders.

We have previously demonstrated that the tax imposed by the Act of 1907, as last amended by the Act of 1929, is not imposed on the property and assets of the appellant, but is a tax imposed on the shares of the appellant in the hands of the shareholders. Therefore, the appellant is not entitled to the deduction from its total assets as contended, and the court below so ruled.

The appellant contends that the market value of the shares of other corporations, to wit, $155,989, owned by it, should be deducted from capital stock paid in, surplus, and undivided profits. This contention is based entirely upon the similarity of the language of the Act of 1907, as last amended by the Act of 1929, and the language of the personal property tax Act of

June 17, 1913, P. L. 505. This contention is likewise erroneous.

In the first place, it is important to note that the appellant did not prove that it had purchased the stocks in question out of capital paid in, surplus and undivided profits, and **therefore it can claim no deduction therefor under any theory which it may advance.** In support of this, we have the decision of this court in COMMONWEALTH v. HAZELWOOD SAVINGS & TRUST Co., 271 Pa. 375 (1921), which affirmed 23 Dauphin 244 (1920). In that case, Mr. Chief Justice Moschzisker said (p. 377):

> "* * * If it had purchased the nontaxable securities referred to, from a fund composed solely of 'the capital stock paid in, the surplus and undivided profits,' of course the whole value thereof should be deducted; just as, if it had paid therefor wholly out of its other assets, no part of this value would be deductible. Since the company did not prove its purchase of these securities out of capital stock account, the Commonwealth might, perhaps, have refused to allow any deduction whatever; but, instead of doing this, it adopted the more equitable course of apportioning the value of the nontaxable securities between the two funds, because, so far as shown, the price of them came from both. No statute, authority or principle has been cited questioning the right to do this; and, the result reached being equitable, the trust company lacks just ground of complaint."

The appellant did not prove that it had purchased these stocks out of capital paid in, surplus, or undivided profits. It may have been very difficult or im-

possible for the appellant to unscramble depositors' money from the capital stock account and shown from which the stock was purchased. However, this is entirely a matter for the appellant. As stated by Mr. Chief Justice Moschzisker in the quotation just given, the appellant not having proved its purchase of these stocks out of capital, surplus, or undivided profits, the Commonwealth might "have refused to allow any deduction whatsoever." But here, as in the HAZELWOOD SAVINGS & TRUST COMPANY CASE, supra, it pursued the more equitable course.

If the appellant had proved that the shares of stock of other corporations owned by it having a market value of $155,989., were purchased out of capital stock paid in, surplus, or undivided profits, it would have been entitled to a deduction, not on the basis of market value of such shares, but only to the extent, to wit, $71,373. that a capital stock tax or tax on shares had been paid upon such shares by the corporations whose stock was owned by appellant, or to the extent that such shares were relieved from the payment of a capital stock tax: COMMONWEALTH v. GIRARD TRUST COMPANY, 26 Dauphin Co. 216, 224, 3 D. & C. 722 (1923). Inasmuch as the appellant did not prove that it had purchased any of the shares of stock of other corporations owned by it out of capital stock paid in, surplus or undivided profits, the Commonwealth allowed in the tax settlement here a deduction such as was determined to be equitable by this court in COMMONWEALTH v. HAZELWOOD SAVINGS AND TRUST CO., 271 Pa. 375 (1921).

The procedure pursued by the taxing officers with respect to the stock owned by the appellant is detailed fully in paragraph 1 of the stipulation of facts (R-13). There is no dispute about the first two items of the formula: Item $441,667. represents the amount of capital stock paid in, plus the surplus and the undivided profits; the item of $25,247. represents the appreciation added thereto. From this was deducted the result of the apportionment. This apportionment, the so-called minor fraction, was used to get the proportionate amount to be deducted because of the ownership of stock in other corporations, just referred to. In doing this, the taxing officers pursued the same method which was followed in COMMONWEALTH v. HAZELWOOD SAVINGS AND TRUST COMPANY, 271 Pa. 375 (1921).

As previously detailed in this brief the Act of 1907, as amended, provides that the shares of stock of trust companies shall be assessed on the actual value thereof, to be ascertained by adding together "so much of the amount of capital stock paid in, the surplus, and undivided profits **as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares**, and dividing this amount by the number of shares." In making this determination, as set forth in the stipulation of facts, the taxing officers examined the capital stock report or tax on shares report of each of the corporations whose shares of stock were owned by the appellant, and the taxable value of the capital stock, or, in case it was a manufacturing corporation, the value of the

capital stock relieved from capital stock tax, was ascertained from the particular settlement. These values in each case were divided by the total number of issued and outstanding shares of stock of the particular corporation to get the taxable value per share, or the value per share relieved from tax, as the case might be. These values were then multiplied by the number of shares of stock of each said corporation owned by the appellant.

As also explained in the stipulation of facts when the taxing officers came to consider the stock of the Philadelphia National Bank, included in the list owned by the appellant, they found that the capital stock tax settlements of these companies had not been completed. Consequently, instead of holding up the entire settlement of the defendant, the taxing officers used the market value of the stock of these two companies. It is to be noted in this connection that the appellant in its brief contends that the Philadelphia National Bank shares should have been deducted at their full value, to wit, $20,202. This point will be discussed later in this Brief under a separate heading.

In the list in paragraph 4 of the stipulation of facts (R-16) it will be noted that the taxing officers used the sum of $20,202. for the 182 shares of the Philadelphia National Bank. The shareholders of this bank were liable for tax on shares during 1930 and it was included in the list by the taxing officers because of that fact. The Act of 1907, as amended, not only allows a deduction for ownership in shares of stock of corporations liable to pay a capital stock tax or relieved

from the payment of capital stock tax but also to those liable to pay tax on shares. However, only to the extent to which tax on shares has been paid to Pennsylvania is there to be an allowance. In addition, no allowance need be made in the case of the ownership of these shares any more than for the ownership of any other shares, as previously discussed, unless it is proved by the appellant that the shares were purchased out of capital paid in, surplus, or undivided profits: COMMONWEALTH v. HAZELWOOD SAVINGS & TRUST Co., supra.

After obtaining the multiplicand, the taxing officers used the fraction, the numerator of which represents capital paid in, surplus, undivided profits, and appreciation, and the denominator the value of total assets. This method was used in order to obtain the proportionate part of the amount of the multiplicand $71,373.00 to be allowed as a deduction for the ownership of these shares of other corporations in keeping with the method approved in COMMONWEALTH v. HAZELWOOD SAVINGS & TRUST Co., supra. The quotient of the fraction, as indicated in the stipulation of facts (R-15), amounted to $8,886. This sum represented the amount to be deducted from capital paid in, surplus, and undivided profits, in keeping with the provisions of the Act of 1907, as amended. Deducting the $8,886. from $467,714., being capital paid in, surplus, and undivided profits plus appreciation, the value of the shares subject to the tax, to wit, $458,028, was obtained.

(b) The Deductions Provided by the Amendments of the Act of 1923 and 1927 to the Act of 1907 Does Not Change the Nature of the Tax From a Tax on Shares.

The appellant objects to the method of deduction used by the taxing officers of the Commonwealth, and insists on an allowance of the market value of these shares. It contends that the method set up in the Act of 1907, whereby the value of the shares was to be ascertained by adding together the amount of the capital stock paid in, the surplus, and undivided profits, and dividing the same by the number of shares, was the proper method. It contends further that when the Legislature in 1923 amended the Act of 1907 by providing that the value of the shares should be ascertained by adding together **"so much** of the amount of the capital stock paid in, the surplus, and undivided profits, **as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,** and dividing this amount by the number of shares," it set up an invalid method and the act no longer provided for a tax on shares in the hands of the shareholders. It also contends that when the Legislature in 1927 further amended the Act of 1907 by adding the words "or relieved from the payment of capital stock tax" following the words "liable to pay to the Commonwealth a capital stock tax," in the amendment of 1923 it provided for the deduction for shares owned in Pennsylvania corporations in the same manner as the personal property tax Act of June 17, 1913, P. L. 507. From this, appellant argues that as a result of the decision in DUPUY

v. JOHNS, 261 Pa. 40 (1918), it is entitled to a full deduction of the market value of the shares owned by it in other corporations.

DUPUY v. JOHNS was a personal property tax case in which the plaintiff, a resident of Pittsburgh, failed to include in his personal property tax return shares owned by him in the Crucible Steel Company of New Jersey. The company had capital stock of 75 million dollars, 14 million of which were employed in Pennsylvania, and all except $29,000 in manufacturing. The company paid a capital stock tax in Pennsylvania on only $29,000. The plaintiff brought a bill to restrain the collection of the assessment against him of 61/75 of the value of the stock, being the proportionate part of the stock which represented property outside of Pennsylvania, claiming that his shares were fully exempt under Section 1 of the Act of 1913, P. L. 507. This court sustained his contention. In other words, it held that in the case of personal property tax, where the foreign corporation was liable for any capital stock tax, or was relieved from capital stock tax or tax on shares, the entire shares owned by the individual were exempt. This decision has no application to the present case, where we are dealing with the ownership of shares of stock by a trust company under a method of taxation expressly provided for trust companies by the Act of 1907, as amended.

The first contention of the appellant that the deductions provided by the amendments of 1923 and 1927 to the Act of 1907 change the nature of the tax from a tax on shares to a capital stock tax, and that

the bank would therefore be entitled to a full deduction for shares owned, is clearly erroneous.

The lower court in discussing this contention of the appellant said, in its opinion (R. 52):

> "We are not able to follow the contention of the defendant that the amendments to the Act of 1907 by the Acts of 1923 and 1927 changed the nature of the tax from a tax on shares to a capital stock tax and that the bank would therefore be entitled to a full deduction for shares owned. That contention is clearly established to be erroneous by the decisions in COM. v. MORTGAGE TRUST CO., supra, COM. v. UNION [fol. 73] TRUST CO., supra, and COM v. GIRARD TRUST CO. supra. * * *"

The contention of the appellant is predicated on the theory that in order to constitute a tax on shares in the hands of the shareholders, the tax must be imposed upon the **entire** interest of the shareholder without diminution of value by reason or on account of the kind of property which constitutes the capital stock of the corporation which issued the shares. The appellant points out that the Act of 1907 as last amended seeks to impose a tax on the actual value of the shares in the hands of the shareholders, and contends that these acts fall short of this purpose, since a deduction from the actual value of the shares is provided, and that because of this fact the tax imposed by these acts becomes a tax on the assets and property of the appellant instead of a tax on the shares of appellant in the hands of the shareholders.

In support of its contention, the appellant relies upon:

(a) decisions of the Supreme Court of Pennsylvania under Section 1 of the Personal Property Tax Act of 1913, P. L. 507, i. e., DUPUY v. JOHNS, 261 Pa. 40 (1918) and CALLERY'S APPEAL, 272 Pa. 255 (1922) and

(b) the opinion of the Supreme Court of the United States in the case of VAN ALLEN v. THE ASSESSORS, 70 U. S., 573 at 588 (1886).

On the other hand, it is the position of the Commonwealth that these cases relied upon by the appellant are not applicable and do not support the contention of the appellant. The Supreme Court of Pennsylvania has said that the personal property tax and the tax on bank shares are two different taxes and that its decisions in the personal property tax cases are not in point and are not applicable to cases involving tax on shares. COMMONWEALTH v. SCHUYLKILL TRUST COMPANY, 315 Pa. 429 (1934) R. 90. See also opinion of lower court in the same case COMMONWEALTH v. SCHUYLKILL TRUST COMPANY, 38 Dauphin County Court 22 (1933) R. 51, 52, 53, 54. This construction by the Pennsylvania State courts of the acts imposing a personal property tax and a tax on bank shares in the hands of shareholders is binding on this court. FIRST NATIONAL BANK OF GARNETT, KANSAS v. AYERS, 160 U. S. 660 at 664, 16 Supreme Court 412, and FIRST NATIONAL BANK v. CHEHALIS Co., 166 U. S. 440 at 444, 17 Supreme Court 629.

The court in its opinion in the case of VAN ALLEN v. THE ASSESSORS did not rule that in order to be a valid tax upon a share of stock in the hands of a shareholder, the statute must impose a tax on the

shareholders entire interest without dimunition of value by reason or on account of the kind of property which constitutes the capital stock of the corporation which issued the shares. What this court did do was to define the limits in which the states could impose a tax on the shares of national banks. It said at page 588:

> "Upon the whole, after the maturest consideration we have been able to give to this case, we are satisfied that the states possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organizations. * * *"

This court, therefore, did not say that the states could not impose a tax upon less than the shareholders entire interest. Many state statutes in computing the amount at which shares of banks shall be taxed to the shareholders permit an allowance for real estate taxed to the bank. This court has recognized these deductions even though not provided in the Act of Congress permitting states to tax shares of national banks. COMMERCIAL BANK v. CHAMBERS, 182 U. S. 556, at 561, 21 Supreme Court, page 63, in which case the state statute provided for deduction of real estate taxed to the bank. This court upheld the deduction of real estate located in the taxing state but denied deduction of real estate located outside of the taxing state. See also AMOSKEAG SAVINGS BANK v. PURDY, 231 U. S. 373, 34 Supreme Court 114, in which case the court said that the allowance of the real estate as a deduction by state statute was a mere gratuity.

Many state statutes not only provide for deduction of the value of real estate taxed separately to the bank in arriving at the value of the shares to be taxed to the shareholders but also for deduction of bona fide debts of the shareholder, nontaxable securities, etc. See COOLEY ON TAXATION, 4th Ed. Vol. 3, Sections 987, 988, 989 and 997. Furthermore, this court, in its opinion, in the case of BANK OF CALIFORNIA NATIONAL ASSOCIATION v. RICHARDSON, 248 U. S. 476 (1919) permitted deduction for shares of stock of a national bank owned by another national bank. These cases decided by this court show conclusively that in order to constitute a valid tax on shares of bank stock in the hands of shareholders, the tax need not be upon the shareholders entire interest. A contrary conclusion would render invalid every taxing statute not only of Pennsylvania but of every other state permitting an allowance in computing the amount at which shares of banks shall be taxed to the shareholders and it would be an impossibility if as appellant contends that the tax must be upon the shareholders' entire interest to constitute a valid tax on bank shares in the hands of shareholders, to impose a tax on the shareholders of national banks where one national bank owns the shares of another national bank. Where the state statute does permit a deduction in computing the amount at which shares of banks shall be taxed to the shareholders, it is exclusively with the shares of stock and their true value as representing the entire corporate assets that the taxing authority has to deal and not with the nature and locality of the investment of the capital stock of the corporation except as to the assets or

thing provided by statute to be deducted. COMMERCIAL BANK v. CHAMBERS, supra, page 865. This case answers the argument of the appellant that where deduction is provided by statute in computing the amount at which shares of banks shall be taxed to the shareholders, the tax is thereby imposed actually upon the remaining assets of the corporation not deducted.

V. Proper Deduction Has Been Made in the Tax Settlement for Ownership of National Bank Shares.

It is contended by the appellant that it owned, during the tax year, 182 shares of stock of the Philadelphia National Bank, having a market value of $20,202, and that it should have been allowed a deduction for these shares at their full market value. It is insisted that failure to exclude the full market value of the Philadelphia National Bank shares from capital stock paid in, surplus and undivided profits constituted a violation of Section 5219 of the Revised Statutes of the United States.

In the first place, this objection was not raised in any of the specifications of objection filed with the appeal in this case (R 4-9). To raise this question before the court on the appeal, it was essential that this be done: The Fiscal Code of 1929, P. L. 343, Sec. 1104. Consequently, this objection not having been specifically raised, the question was not before the court below for review at the time of the hearing of the appeal in that court: D. L. & W. R. R. v. COMMONWEALTH, 66 Pa. 64 (1870); COMMONWEALTH v. PHILADELPHIA CITY AND COUNTY, 157 Pa. 550 (1893). The

opinion of the court below makes reference to all of the questions raised but makes no reference to this question. The mere fact that the appellant injected it into two or three of its requests for conclusions of law, which were refused by the court, cannot have the effect of making it a valid specification of objection. Therefore, we submit that the question was not before the court below and appellant is not now in position to raise it here.

Furthermore, the appellant has not proved that these national bank shares were purchased out of and are represented by capital stock paid in, surplus or undivided profits. The burden of establishing this was on the appellant. As previously explained, the taxing officers allowed a proportionate deduction as approved of by this court in COMMONWEALTH v. HAZELWOOD SAVINGS & TRUST CO., supra. Not having proved the purchase out of capital, surplus or undivided profits, appellant is in no position to complain about deduction on account of Philadelphia National Bank shares. In addition, it is to be noted that in making the calculation for the purpose of the proportionate deduction, the taxing officers actually used the market value of the national bank shares, to wit, $20,202 in the multiplicand of the apportionment fraction (par. 4 stipulation of facts) (R-16).

The appellant relies on BANK OF CALIFORNIA NATIONAL ASSOCIATION v. RICHARDSON, 248 U. S. 476 (1919) in claiming deduction of the full market value of its shares of the Philadelphia National Bank. In that case, the Bank of California owned shares of the

Mills National Bank and shares of the Mission Bank, a state bank, organized under the laws of California. The Bank of California was assessed as a shareholder in the Mills National Bank and as a shareholder in the Mission Bank. The shares of the Mills National were assessed to the California Bank at $645,546.30 and the shares of the Mission Bank were assessed at $121,916.50. When the Board of Equalization assessed the share of the Bank of California to the shareholders of that bank, the value at which the shares of the Mills National Bank, and of the Mission Bank were assessed to the California Bank as a shareholder were included in the value placed on the shares of the California Bank; i. e., $15,775,252.67 (which appears to represent excess of assets over liabilities, total assets being $67,396,982).

It does not appear from the record that the State of California offered any evidence to show that the assessed value of shares of the Mills National Bank and of the shares of the Mission Bank was not included in the amount of $15,775,252.67 which represented excess of assets over liabilities. The decision of the court is based upon the assumption that the assessed value of these shares did appear in the value used in assessing the shares of the California Bank to the shareholders of that bank.

The United States Supreme Court in that case, held that the assessed value of the shares of the Mills National Bank should be excluded in valuing the shares of the California Bank on the ground that to include such value would violate Section 5219 of the Revised

Statutes of the United States, concerning the taxation of shares of national banks to the shareholders. The court held that the assessed value of the shares of the Mission Bank should not be excluded but that the California Bank could not be taxed as a shareholder in that bank since to do so would also be in violation of Section 5219 of the Revised Statutes. The California statute under consideration did not provide for deduction from capital paid in, surplus and undivided profits if shares of other corporations were purchased out of these amounts as is provided in the Trust Company Act of 1907 as last amended by the Act of 1929. Under the Pennsylvania statutes, if proof is submitted showing the purchase by a trust company of shares of national banks paying a tax on shares to Pennsylvania out of capital paid in, surplus and undivided profits deduction will be allowed to the extent that tax has been paid on such shares. But here it has not been shown that as a matter of fact that any part of capital paid in, surplus and undivided profits of the appellant is represented by investment in shares of the Philadelphia National Bank.

In VAN ALLEN v. NOLAN, 70 U. S. 573 (1866) the Supreme Court approved a tax on shares in the hands of shareholders without deduction for United States securities.

In BANK OF CALIFORNIA v. RICHARDSON, 248 U. S. 476 (1919) the court approved a tax on shares in the hands of shareholders after deducting the assessed value of shares of stock of a national bank owned by the California Bank. The only theory on which the

decision in the California Bank case can be explained is that of avoiding the imposition of a double burden on the shares of stock of the national bank owned by the California Bank.

This court, in the later case of DES MOINES v. FAIRWEATHER, supra, said as to the meaning of the decision of the BANK OF CALIFORNIA v. RICHARDSON, supra, inter alia, at page 115:

> "* * * The shares in the other national bank were wrongly taken into account in valuing the shares of the stockholders, because the provision under which they were taxed to the bank was intended to be exclusive and to prevent the values in the shares from being made, directly or indirectly, a basis for any other or further taxation. * * *"

In the instant case, the appellant did not offer proof to show the shares of stock of the Philadelphia National Bank owned by it were purchased out of capital, surplus and undivided profits, the sum of which was used as the measure of the taxable value of the shares of the appellant in the hands of its shareholders. In the absence of proof, therefore, the Commonwealth of Pennsylvania in the tax settlement apportioned the full value of the shares of the Philadelphia National Bank between the sum of the capital, surplus and undivided profits and the total assets of the appellant. This resulted in the allowance of an equitable deduction for ownership of shares of stock of the Philadelphia National Bank.

We submit, therefore, that proper deduction has

been allowed for investment by appellant in shares of stock of the Philadelphia National Bank in accordance with the principle of avoiding double taxation on such shares.

VI. The Act of 1907, as Amended, Imposing a Tax Upon the Shares of Trust Companies in the Hands of Shareholders as Construed and Applied in the Tax Settlement Does not Discriminate Against United States Securities, Philippine Island Bonds, Joint Stock Land Bank Bonds and National Bank Shares.

It is contended by the appellant that the amendments to the Act of 1907 made in 1923, 1927 and 1929, discriminate against United States securities in that they provide for deduction of that portion of capital paid in, surplus and undivided profits invested in shares of stock of corporations liable to pay or relieved from payment of capital stock tax to the Commonwealth.

Bonds of the United States were first exempted from taxation by Act of Congress in 1862, 8 Fed. St. (2nd ed.) p. 407, the present exempting act is Section 3701 of the Revised Statutes, 31 U. S. C. A. Sec. 742. The basis of this exemption is the fact that a tax on obligations of the United States is virtually a tax on the credit of the government, and upon its power to raise money for the purpose of carrying on its civil and military operations In First National Bank v. Kentucky, 9 Wall. 353 (1870), the court said (p. 362):

> "That limitation [upon the power to tax] is, that the agencies of the Federal governmen: are

> only exempted from state legislation, so far as that legislation may interfere with, or impair, their efficiency in performing the functions by which they are designed to serve that government."

In HIBERNIA SAVINGS AND LOAN SOCIETY v. CITY AND COUNTY OF SAN FRANCISCO, 200 U. S. 310 (1906) the court said, (pp. 314, 315):

> "* * * It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, * * * upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power * * *".

We submit that appellant's contention that there is discrimination against United States securities in the tax on shares as provided by the Act of 1907, as amended is well answered by the court below as follows (R-55).

> "It is claimed by the defendant that by the amendment of 1923 there is a discrimination against the United States securities, Philippine Island bonds, and Joint Stock Land Bank bonds, owned by the defendant. We are of opinion that this contention is not sound. There is no discrimination against other assets of the trust company when the trust company act and its amendments provide for deduction of that portion of capital stock, surplus, and undivided profits invested in shares of corporations liable to pay or relieved from payment of capital stock tax to the commonwealth. The sole purpose of this exemption clause was to avoid double taxation.

> It is a well established policy in Pennsylvania not to impose a tax upon both the capital stock of an ordinary corporation, and upon the shares of stock in the hands of the shareholders; nor upon both the assets and property of a trust company, and upon the shares of stock of the trust company in the hands of shareholders. It is the policy of the commonwealth to tax one or the other—in the case of ordinary or industrial corporations, the capital stock of the company; in the case of trust companies, the shares of the trust company in the hands of the shareholders. With this well established policy in mind we fail to discover any discrimination on the part of the taxing officers."

Thus so far as the principle involved in the tax here in question is concerned, there is no discrimination. In many states, statutes provide for deductions in arriving at the value of shares of stock of banks to be taxed to the shareholders (although no special provision is made for deduction of United States securities). So far as our search has revealed, no cases construing such statutes have held that there is discrimination against United States securities in allowing the deduction provided in the statutes. See COOLEY ON TAXATION, 4th ed. Vol. 3, Secs. 987, 988, 989 and 997.

The appellant bases its contention on the cases of MISSOURI v. GEHNER, 281 U. S. 313 (1930), and MACALLEN CO. v. MASS., 279 U. S. 620 (1929). The Gehner Case involved a tax on the property of insurance companies. The MacAllen Co. Case involved a tax on the income of an ordinary corporation derived from United States securities. In both of these cases, an attempt was made to impose tax directly on United

States securities as an asset of the corporation owning them. The Supreme Court said that it was obvious that the state legislation involved in those cases was designed to impose the tax on United States securities. Consequently they violated the act of Congress exempting United States securities from taxation.

The Trust Company Act of 1907, as last amended by the Act of 1929, does not impose a tax on the assets or property of trust companies, but as the court below held the tax is only on the shares of stock of trust companies in the hands of shareholders. Therefore, these two cases relied upon by the appellant do not support its contention. In addition to this, no discrimination as to United States securities, has been shown to exist as a fact in the instant case. Discrimination is not a matter of fiction. Proof of the existence of the fact of discrimination must be submitted unless clearly revealed by the statute itself under consideration. We have previously fully shown that so far as the facts of the settlement in this case reveal no actual discrimination exists. Further, for more than twenty years, the method of settlement pursued in the instant case (the optional method of settlement in the Act of 1907 being the same, and adopted generally under that act) has been followed without any claim of discrimination against United States securities being made in any appeal up to the tax period here involved. If this is a substantial contention in actual fact why has there been no complaint of discrimination for all this period of time. The answer is apparent. There is no discrimination here, in law or fact.

VII. The Shares of Stock Owned by Nonresidents are Subject to the Tax on Shares, Provided by the Act of 1907, as Amended.

In the assignments of error Nos. 8 and 10 (R. 113-115), it is claimed that if the tax in question is a tax on shares, then the 166 shares of stock of the appellant owned by nonresidents are not subject to the tax. In the Stipulation of Facts, it is agreed that 166 shares of defendant's stock are owned by nonresidents of Pennsylvania (R. 17).

Although this objection was thus raised, it rather appeared in the court below to have been raised as a point of little consequence in view of the fact that only one sentence in the appellant's elaborate brief of argument in the court below made any reference thereto. Likewise, very little was said by the appellant at the oral argument on this point. In addition, to have this point so strenuously pressed now, in view of the fact that for all these years from 1907, no question of this character was raised by any of the learned counsel who represented the taxables involved, seems very unusual. At least, it leads to the conclusion that the contention now made that the language of the Act of 1907 "clearly" did not apply to all of the shares of stock of trust companies both resident and nonresident owners, is without foundation, to characterize it mildly. Irrespective as to what the appellant may now contend on this point as to the act here in question, the fact remains that the taxing officers of the Commonwealth—first the Auditor General and State Treasurer, and since The Fiscal Code,

the Department of Revenue and the Department of the Auditor General, definitely interpreted the Act of 1907, and its amendments as they have been made, as imposing a tax on all of the shares of the trust company in the hands of the shareholders whether they be resident or nonresident, and this interpretation was universally accepted up to the tax period here in question. For 23 years therefore, this interpretation has stood unchallenged. What has transpired to raise the question now? Did the decisions of the United States Supreme Court in FARMERS LOAN & TRUST CO. v. MINNESOTA, 280 U. S. 204 (1929), and the other inheritance tax decisions which followed including FIRST NATIONAL BANK OF BOSTON v. MAINE, 284 U. S. 312 (1932) have anything to do with directing attention to the Pennsylvania Trust Company tax on shares? We doubt it because the imposition of transfer inheritance tax is fundamentally different than the imposition of a tax on shares of a bank or trust company in the hands of the shareholder. The Supreme Court said concerning this situation in FIRST NATIONAL BANK OF BOSTON v. MAINE, supra, (p. 329):

> "* * * since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. * * *"

The Supreme Court of Pennsylvania in its opinion (R. 92) in deciding this question said:

"Lastly, appellant argues that even though the tax in question in this proceeding be a tax on shares rather than a tax on the assets of the trust company, there is no jurisdiction in the Commonwealth of Pennsylvania to levy a tax on 166 shares owned by nonresidents. The authorities relied upon by counsel for appellant do not sustain this proposition. COMMONWEALTH v. STANDARD OIL COMPANY, 101 Pa. 119 was a capital stock tax case and does not impinge upon our decision here. DUPUY v. JOHNS, 261 Pa. 40 relates to personal property tax levied under the Act of June 17, 1913, P. L. 507, and is likewise not in point. Nor is the tax here in question within the prohibition against double taxation enunciated by the decisions of the United States Supreme Court in FARMERS LOAN & TRUST CO. v. MINNESOTA, 280 U. S. 204, and FIRST NATIONAL BANK OF BOSTON v. MAINE, 284 U. S. 312, for those cases concern the imposition of transfer inheritance taxes upon choses in action at the death of the owner and can have no application here. [fol. 126] The principle that shares of stock of a corporation may be taxed by the state of incorporation whether in the hands of resident or nonresident owners is clearly upheld in CORRY v. BALTIMORE, 196 U. S. 466, where it is said, pages 476, 477: '* * * the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and * * * a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation.' We are of opinion the Act of 1907, P. L. 640, as amended by the Act of April 25, 1929, P. L. 673 establishes the situs of the shares of appellant in Pennsylvania for the purpose of taxation within the meaning of the act."

In addition, there has been no amendment of the Act of 1907, since its passage, which had to do with any change in the reporting of the shares or the assessment of the tax thereon, so far as this particular question is concerned, either directly or indirectly. It would appear that this present attack is only another example of the people becoming more tax conscious during a period of depression and using the proverbial magnifying glass to find flaws in the taxing statutes.

In view of the contention here made, the first question arises as to whether the Legislature in the Act of 1907, as amended, actually intended to tax all of the shares of stock of trust companies in the hands of the shareholders. As previously stated, the act has been interpreted by the taxing officers of Pennsylvania, ever since its enactment, to tax all shares owned by both residents and nonresidents. However, let us carefully examine the act itself with this point in mind.

The Act of 1907, as last amended by the Act of 1929, P. L. 673, requires every title insurance or trust company incorporated in Pennsylvania under the provisions of the acts therein referred to, to report on or before a certain date to the Department of Revenue setting forth **"the full number of shares of the capital stock** subscribed for or issued by such company, etc." And thereupon it is provided that the Department of Revenue shall assess **"such shares** for taxation at the rate of five (5) mills upon each dollar of the actual value of **each share of stock"** to be ascertained as therein provided. Near the end of Section 1 it will be

noted that it is provided: "That **upon the payment of the tax** fixed by this act into the State Treasury, through the Department of Revenue, the **shares** and so much of the capital, surplus, profits, and deposits of such company as shall not be invested in real estate **shall be exempt from all other taxation under the laws of this Commonwealth.**" Thus it will be noted that the Act of 1907, as amended, clearly and definitely imposes a tax on **all** of the shares of the stock of trust companies in the hands of the stockholders, whether they are resident or nonresident.

The Act of 1907, as amended, also clearly and definitely provides for notice of the assessment of the tax on shares as settled by the taxing officers by requiring the same to be posted in a conspicuous place in the company's place of business. If the president, cashier, or treasurer of such company refuse to post the notice as required, such officer shall be adjudged to be in default and as a penalty therefor the company is made liable for the tax assessed against the stock holders.

The act further provides that it shall be the duty of the Auditor General (now the Secretary of Revenue) to hear any stockholder upon the subject of the valuation of any shares of stock at his office, within a period of thirty (30) days from the date of such settlement.

In view of the above provisions can it be seriously contended that the Legislature of Pennsylvania did not clearly and definitely intend to tax in Pennsylvania, the situs of the trust company where the in-

vestment was made, all of the shares of stock of the shareholders whether they be resident or nonresident? In addition to the clear statement all through section one of the Act of 1907 that all of the shares are to be taxed, we wish to call particular attention to the proviso, previously referred to, near the end of Section 1, which provides that upon the payment of the tax fixed by the act "the shares and so much of the capital, surplus, profits and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth" —meaning local taxation. What could be clearer than this to show that the Commonwealth was taxing all of the shares? If this were not so and only resident shares were taxed, there would be a proportionate liability for local taxation on that part of capital, surplus, profits and deposits represented by nonresident shares.

However, it is contended by appellant that this is contrary to the principle laid down by this court in COMMONWEALTH v. STANDARD OIL CO., 101 Pa. 119 (1882) "that the shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another state cannot be taxed here," and that this principle has not since been changed in Pennsylvania. But it is important to note that the court was there dealing with a capital stock tax case and not a tax on shares. When it came to enact the law providing for a tax on shares of a trust company in 1907, the Legislature had before it a very different problem. It was important for many reasons that all the shares be taxed and it so provided. As stated by Mr. Justice

Elkin in COMMONWEALTH v. MORTGAGE TRUST CO., 227 Pa. 163 (1910) at page 180;

> "* * * The legislature, in 1907, made a new class of taxable subjects and provided in express terms a definite method of determining the actual value of the shares of stock belonging to this taxable class. * * *" (Boldface ours)

In view of this intent on the part of the Legislature in the Act of 1907 to tax **all of the shares** of stock in the hands of the shareholders, the question then arises, did the Legislature have the power to impose such a tax applicable to nonresidents as well as residents? We submit that, as determined by the court below, this power is clearly established by the decision of the United States Supreme Court in CORRY v. CITY OF BALTIMORE, 196 U. S. 466 (1904).

However, it is contended by the appellant that the distinction in CORRY v. BALTIMORE is that the situs was created in the charter. The United States Supreme Court did not so state. True, it is that the statute which created the corporation fixed the situs of its stock for the purpose of taxation at the office of the corporation in Maryland. Although our Pennsylvania act does not definitely state in so many words that the situs for taxation of the shares shall be in Pennsylvania, it does definitely provide, as previously indicated, that **all of the shares of stock** of domestic title insurance and trust companies, **issued and oustanding, shall be liable for this tax.** The act could not be more specific in this respect. However, the decision in the Corry v. Baltimore Case does not appear to have rested on the fact that the statute itself declared the

situs for taxation of such stock, but more upon the notice to the nonresident stockholder of the assessment of the tax and the opportunity for contest by him as to the correctness of the valuation or validity of the tax itself. So far as these points are concerned, we submit that the Act of 1907, as amended, together with the provisions of The Fiscal Code, as referred to at the beginning of this brief, provide more definitely for notice of the assessment and the right of hearing by the stockholders than does the Maryland Act in the Corry v. Baltimore Case. In addition to the right of hearing afforded to the stockholder, the Act of 1907 and its amendments also definitely provide for the hearing of the corporation as the agent of the stockholders on all questions pertaining to the assessment of the tax. The Supreme Court of the United States said in CORRY v. BALTIMORE, supra, at page 474:

> "That is was rightly determined that it was within the power of the state to fix, for the purpose of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. * * *"

In addition to CORRY v. BALTIMORE, supra, in further support of the power of the state to impose a tax on shares of trust companies in the hands of nonresident as well as resident shareholders, we cite the following decided cases: ABINGTON BANK v. WASHINGTON CO., 88 Va. 293; 13 S. E. 407 (1891); DANVILLE BANKING COMPANY v. PARKS, 88 Ill. 170 (1878); SCANDINAVIAN-

AMERICAN BANK v. PIERCE Co., 20 Wash. 155, 55 Pac. 40 (1898); STATE v. TRAVELERS INSURANCE Co., 70 Conn. 590, 40 Atl. 465 (1898); ST. ALBANS v. NATIONAL CAR Co., 57 Vt. 68 (1884); KOOCHICHING Co. v. MITCHELL, 173 N. W. (Iowa) 151 (1919).

In STATE v. TRAVELERS INS. Co., supra, a Connecticut statute, provided for a tax on shares and required the cashier of certain corporations to deliver to the controller a sworn list of all shareholders residing outside the state on a designated date and imposed the tax on such nonresidents, to be collected by the cashier of such corporations. It was contended that the statute attempted to tax property beyond the jurisdiction of the state. The court overruled this contention and said at page 603:

> "There is nothing in the objection urged in the demurrer to the complaint, that the law in question 'attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State.' Each nonresident shareholder participates in the enjoyment of a franchise granted by this State, and has an equitable interest in property which is protected by this State, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a situs within its territory for purposes of taxation. TAPPAN v. MERCHANTS' NATIONAL BANK, 19 Wall. 490; LOCKWOOD v. WESTON, 61 Conn. 211, 218. To do this it is not necessary to declare in terms that they shall be deemed to be situated where the corporation belongs. It is enough to lay a tax upon them there, and impose a lien upon them there."

In ST. ALBANS v. NATIONAL CAR CO., supra, a Vermont statute provided for a tax on shares against certain corporations and that shares of stock in these corporations owned by residents of the state should be listed at the place of residence and those shares owned by nonresidents should be listed at the town where the corporation has its principal place of business, which corporation is the collector of the tax. This tax was upheld by the Vermont courts. The facts revealed that the Car Company was incorporated in 1868, and that the charter was granted subject to future legislation. The tax was passed in 1880. The court said, at page 81:

> "* * * Admitting the general doctrine that in the absence of all provisions to the contrary, the stockholders in a corporation can be taxed upon their stock at the place where they reside, we think it is equally true that the nature of stock is such that it may be taxed elsewhere. If shares of stock represent nothing but that which is intangible, it could with better reason be claimed that it must always follow the domicile of the owner, and could not be taxed elsewhere; but it represents the property of the corporation, that in which the capital stock is invested. * * * Judge Cooley, in his valuable work on taxation, p. 274, in stating the general rule, that 'the individual corporators, if taxed on their shares of stock, are to be taxed where they respectively reside,' adds this important qualification, 'though they may be and sometimes are, taxed at the place where the corporate business is carried on.'
>
> "But we think there is a still stronger reason why the taxation in question was valid. The corporate home of the company is in this State; the

corporation is expressly subject to the exclusive legislative authority of the State; * * * its dwelling is here, although it may do business elsewhere; and its members, when they enter into the relation of stockholders, do so subject to such changes in the law relating to the corporation as the supreme legislative authority deems it proper to make. * * *"

And with respect to the fact that the tax came after the charter it said:

"* * * It was conceded in argument that if the statute relating to the taxation of the shares had been inserted in the charter, that taxation under it would be legal. The charter would have been taken by the stockholders subject to such provision. But the stockholders took the charter subject to the right of the legislature to modify or repeal its provisions. Such modification may be made by general law, applicable to all similar corporations as well as by special amendments to each charter. Taking the charter subject to the power of future legislation, the stockholders took it subject to the law in contention as absolutely as if it had been included in the charter originally. The corporation also received its existence subject to modification by future legislation, though under the form of a general law. We see no valid reason why we should hold, without such a provision in the charter originally, that upon the acceptance of it, the stockholders or corporation should be exempt from the duties relating to taxation which are intended to apply to all alike. The taxation, therefore, in the manner shown, was legal."

So in the instant case, the appellant received its charter subject to the right of the Pennsylvania Legis-

lature to alter, amend, revoke or annul the same (Pennsylvania Constitution, Article XVI, sec. 10); and it follows that if it is contended that the Act of 1907 (and its amendments) is inconsistent in any way with the charter granted to appellant under the Act of 1874, the Act of 1907 must control and the corporation and its shareholders be bound by its provisions.

In addition to the above, from the standpoint of "business situs", which was referred to by the United States Supreme Court in FARMERS LOAN AND TRUST COMPANY v. MINNESOTA, supra, the situs for taxation of bank shares should be at the domicile of the bank for just as much reason as the situs of national bank shares for taxation is the situs of the bank as declared by Act of Congress because as said by the Supreme Court of the United States in TAPPAN v. MERCHANTS NATIONAL BANK, 19 Wall. 490 (1874) at page 503:

> "A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts its business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated

bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation."

And again at page 499:

"* * * Every owner takes the property subject, to this power of taxation under state authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. * * *"

VIII. CONCLUSION

A. The Commonwealth submits that the tax imposed by the Act of June 13, 1907, P. L. 640, as amended is a tax on shares in the hands of the shareholders.

B. That there is no discrimination against U. S. securities, Philippine Islands bonds, Joint Stock Land Bank bonds, and national bank shares by the statute as construed and applied in the tax settlement made against the appellant.

C. That the tax imposed against the appellant does not make the national bank shares the basis of an additional and further tax.

D. That the tax imposed by this statute on the non-resident shareholders is a proper one.

Therefore, we respectfully submit that the judgment of the court below was right and should be affirmed.

CHARLES J. MARGIOTTI,
Attorney General.

MANUEL KRAUS,
Deputy Attorney General.

EDWARD FRIEDMAN,
Deputy Attorney General.

ROBERT L. MYERS, JR.,
Deputy Attorney General.

APPENDIX

Act approved June 13, 1907, P. L. 640:

Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances, and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled "An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth Anno Domini one thousand eight hundred and seventy-four and of the supplements thereto," approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance, or trust, companies, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, secretary, or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of

five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. The Auditor General shall have the power, and it shall be his duty, in case he shall not be satisfied with the correctness of the report as made by the officers of any such company, to summon the officers of said company to appear before him, upon notice to do so, on a day to be fixed by him, and to bring with them the books of said company for his examination; and he shall have the right to have further evidence to satisfy himself of the correctness of the report made to him on the question of the value of the shares of stock of such company, according to the rule hereinbefore stated. After the Auditor General shall have fixed the value of the shares of stock in any such company by the method hereinbefore provided, and settled an account according to law, he shall thereupon transmit to the president, cashier, or treasurer of such company a copy of such settlement, showing the valuation and assessment so made by him and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, secretary, or treasurer of any such company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such company's place of business, so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of the valuation of such shares of stock, at the Auditor General's office, within a period of thirty days from the date of said settlement. It shall be the duty of every such company, within a period of forty

days after the date of such settlement by the Auditor General, at its option to pay the amount of said tax to the State Treasurer from its general fund, or collect the same from its shareholders and pay over to the State Treasurer: Provided, That if any such company shall fail or refuse to make such report, or to pay such tax, at the time hereinbefore specified, or shall make any false statement in such report, or shall fail or refuse by its officers to appear before the Auditor General upon notice, as aforesaid, or shall fail or refuse to produce its books for examination when required to do so by the Auditor General, he shall, after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain, add thereto fifty per centum as a penalty, assess the tax as aforesaid, and proceed according to law to collect the same from such company: Provided further, That if the president, cashier, or treasurer of any such company shall neglect or refuse to post a copy of the settlement, in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, cashier, or treasurer shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company: And provided further, That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not

invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company, as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth.

Act approved July 11, 1923, P. L. 1071 at page 1072. The important part bearing on this case is as follows:

"* * * and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares. * * *"

Act approved May 7, 1927, P. L. 853.

This act further amended the Act of 1907 which was last amended by the Act of 1923 (page 855):

"* * * and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits

as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. * * *"

Act approved April 25, 1929, P. L. 673; amended by Act approved June 13, 1907, P. L. 640; last amended by Act approved May 7, 1927, P. L. 853:

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled * * *; and thereupon it shall be the duty of the Department of Revenue to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares * * *: Provided * * * That upon the payment of the tax fixed by this act into the State Treasury, through the Department of Revenue, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth."

Section 807 of The Fiscal Code, Act approved April 9, 1929, P. L. 343:

Section 807. Special Procedure in Connection with Valuations of the Stock of Banks, Savings

Institutions, Title Insurance and Trust Co
panies.—After the Department of Revenue sha
have fixed the value of the shares of stock in a
bank, savings institution, title insurance co
pany or trust company, and a settlement sha
have been made as hereinbefore provided, the D
partment of Revenue shall transmit to the pre
dent, cashier, or treasurer of such bank, savin
institution, title insurance company, or tru
company, a copy of such settlement, showing t
valuation and assessment so made by it and t
amount of tax due the Commonwealth on all su
shares. And it shall be the duty of the presiden
cashier, or treasurer, of any such bank, savin
institution, title insurance company, or tru
company, immediately upon the receipt of sa
settlement, to post the same in a conspicuous pla
in such bank, savings institution, title insuran
company, or trust company, so as to give notice
the shareholders of such valuation; and it sha
be the duty of the Department of Revenue to he
any shareholder upon the subject of the valuati
of such shares of stock, at the department's offi
within a period of thirty days from the date
said settlement. If any such hearing be held, n
tice thereof shall be given to the Department
the Auditor General, and that department sha
be represented at such hearing.

It shall be the duty of every bank, savings i
stitution, title insurance company, or trust co
pany, within a period of sixty days after the da
of such settlement by the Department of Revenu
at its option, to pay the amount of said tax fro
its general fund, or collect the same from i
shareholders, and pay the same over to the Sta
Treasurer through the Department of Revenue

Section 1705 of The Fiscal Code, Act approved Apr
9, 1929, P. L. 343.

Section 1705. Failure of Bank, Savings Institution, Title Insurance Company, or Trust Company to Make Report, Pay Tax, or Post Notice of Settlement.— If any bank; or savings institution, having capital stock, incorporated by or under any law of this Commonwealth, or under any law of the United States, and located within this Commonwealth, or any title insurance company or trust company, as defined in section 712 of this act, shall fail or refuse to make the report required by section seven hundred eleven or section seven hundred twelve of this act, at the times therein specified, or shall make any false statement in such report, or shall fail or refuse by its officers, to appear before the Department of Revenue, or shall fail or refuse to produce its books for examination when required to do so by the Department of Revenue, the department shall, after having ascertained the actual value of each share of the capital stock of such company from the best information it can obtain, add thereto ten per centum as a penalty, assess the tax, and proceed according to law to collect the same from such company; and, if the president, secretary, or treasurer of any such company shall neglect or refuse to post a copy of the settlement in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, secretary, or treasurer, shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company.

Article XVI, Section 10 of the Pennsylvania Constitution provides as follows:

"The General Assembly shall have the power to alter, revoke or annul any charter of incorpo-

ration now existing and revokable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation."

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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 3

SCHUYLKILL TRUST COMPANY
Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

SUPPLEMENTAL BRIEF FOR APPELLEE

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EDWARD FRIEDMAN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 708

SCHUYLKILL TRUST COMPANY

Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

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SUPPLEMENTAL BRIEF FOR APPELLEE

At the time of the oral argument in this case, the appellant asked permission to file certified copies of the opinions of the Dauphin County Court in the case of COMMONWEALTH OF PENNSYLVANIA *v.* PROVIDENT TRUST COMPANY, with a memorandum explaining the figures involved in that case.

It is the opinion of the appellee that the appellant has, in its supplemental brief, gone far beyond the authority granted to it by this court with reference to its request and has made certain erroneous and confusing statements with respect to the facts in the Provident Trust Company opinions and also with re-

spect to the principle upon which the Commonwealth relies in certain cases cited by it which the appellee believes should be corrected. It was due to this fact, considering the importance of this case, that the appellee requested and obtained permission to file this supplemental brief.

On page 2½ of the supplemental brief for appellant, it is stated

> "It is submitted that an analysis of this opinion demonstrates the fact that the reasoning, which is the basis of the judgment of the Dauphin County Court, Judge Hargest's theory of the settlement and his mathematical calculations made in the application of his theory contradict expressly the conclusions of the state supreme court in the instant case, to wit, that the tax is a tax upon shares qua shares and therefore United States obligations, Philippine Islands bonds, Joint Stock Land Bank bonds, National Bank shares and Federal Reserve Bank stock are not taxed, are not made the basis of a tax, are not discriminated against and that therefore the state has authority to tax the shares of stock issued by trust companies owned by nonresidents of the state."

and appellant also states on page 10 of its supplemental brief:

> "In deducting assets made tax-free by the statute so as not to tax them the state courts construed and applied the statute as imposing a tax upon assets of the trust company * * *".

This is not correct for the reason that nowhere in the opinion of the Dauphin County Court is the statement, nor can it be inferred from the court's reasoning that the tax in question is not a tax on shares qua shares,

but on the contrary, we refer this court to the language of the court in its opinion (40 Dauphin County Reports, page 163) where the court said:

> "It is settled that the tax imposed upon the shares of a trust company is a tax upon the shares held by the shareholders and is not a personal property tax nor a tax on the assets of the trust company. Commonwealth *v.* Schuylkill Trust Company, 38 Dauphin, 22; 315 Pa. 429; * * *"

and further in the opinion upon the exceptions (41 Dauphin Court Reports, page 4) where the court said:

> "It must be kept in mind that the thing to be accomplished is the taxation of the shares of stock at actual value. Who are to be taxed? The stockholders. The thing to be taxed is what the stockholders own. * * *"

On page 4 of the supplemental brief for appellant, the appellant, after having stated the questions involved at page 3, and referring particularly to question number two (whether the defendant is entitled to a flat or only a proportionate deduction from the value of its shares in investments in capital stock of a Pennsylvania title company, the shares of a national bank and the capital stock of Pennsylvania corporations all paying a capital stock tax or tax on shares) the appellant stated:

> "The court answered the second question by holding that some assets of the trust company were entitled to be deducted 'flat' and others 'proportionately' from the amount of the capital stock paid in, surplus and undivided profits (pp. 159-162) because such assets were included within the class of assets exempted under the language of

> the statute, to wit, 'shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares' * * *"

and it further states at page 6:

> "The significance of the 'proportionate' method of settlement outlined and applied in this case as over against that applied in the case of the Schuylkill Trust Company, the instant appellant, lies in the factors included within and excluded from the numerator and denominator of the fraction and the multiplicand to which the fraction was applied. In the Schuylkill Trust Company case the numerator of the fraction was the actual value of the capital stock, surplus and undivided profits of the trust company; the denominator was the actual value of the total assets in which were included the total value of the shares of stock which are exempt under the language of the statute as well as the value of the non-taxable assets consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and National Bank shares. By reason of the increase of the denominator of the fraction by the inclusion of such exempt and non-taxable assets, the application of the fraction and the formula in determining the amount deducted from the capital stock, surplus and undivided profits in order to determine the taxable value resulted in a lessening in the amount of the deductions and a consequent increase of tax liability (R. 14-17)."

These statements are both erroneous and confusing. The appellant does not inform this court that the reason that certain deductions were made "flat" and others "proportionately" was not only because such assets were included within the class of assets ex-

empted under the language of the statute, but, in addition to this fact, because the court found that upon proof offered, the assets permitted to be deducted "flat" were purchased out of capital stock paid in, surplus and undivided profits, whereas in the absence of proof that the investments were purchased out of capital stock paid in, surplus and undivided profits a proportionate deduction was only allowed for such investments.

The submission of proof of the purchase of certain investments as described in the taxing statute out of capital stock paid in, surplus and undivided profits and the finding of this fact by the court was the basis for the allowance of a flat deduction for such investments in the Provident Trust Company case, and the appellant makes this admission on page 10 of its supplemental brief. In the instant case, the Schuylkill Trust Company did not offer proof showing the purchase of any of its investments out of capital stock paid in, surplus and undivided profits and it was because of this fact, and the court so found, that only a proportionate deduction was allowed for the investments of the trust company and not a flat deduction; the court saying in its opinion at R. page 50:

> "The defendant did not prove that it had purchased these stocks out of capital paid in, surplus and undivided profits. It may have been very difficult or impossible for the defendant to unscramble depositors' money from the capital stock account and show from which the stock was purchased. This, however, is entirely a matter for the defendant. The defendant not having proven its purchase of these stocks out of capital, surplus, and undivided profits, the Commonwealth might

> have refused to allow any deduction whatever, but instead it pursued the more equitable course, as was also done in the Hazelwood Savings & Trust Co. case." (271 Pa. 375)

The presence of proof of the purchase of certain shares of stock out of capital stock paid in, surplus and undivided profits in the Provident Trust Company case and the absence of proof of the purchase of certain shares of stock out of capital stock paid in, surplus and undivided profits in the instant case accounts for the difference in the factors included within and excluded from the numerator and denominator of the apportionment fraction used in each of these cases.

The appellant cannot complain because of the large deduction in the Provident Trust Company case when the deduction in the instant case is based upon the failure of the appellant to prove its right to a greater deduction.

On page 7 of the supplemental brief of the appellant, it is stated in discussing the deduction in the Provident Trust Company case:

> "The deduction was allowed in the amount of $6,616,754. in accordance with the court's construction and application of the provisions of the statute which exempted the class of assets described as (1) shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares and (2) shares of stock of corporations relieved from the payment to the Commonwealth of a capital stock tax or tax on shares. * * *"

This is not correct. The only deduction which was permitted "flat" or "proportionately" in the Provident Trust Company case was for shares of stock upon which a capital stock tax or a tax on shares had been paid. Shares of stock of manufacturing corporations relieved from the payment to the Commonwealth of a capital stock tax were not involved in that case because there were no such shares owned by the Provident Trust Company.

At the oral argument in the instant case before this court, the impression was created that shares of stock of manufacturing corporations relieved from the payment of a capital stock tax had been deducted. We call to the attention of this court that in the instant case, the question of deduction of shares of stock of manufacturing corporations relieved from the payment of capital stock tax was not involved because the Schuylkill Trust Company did not own any such shares, and therefore, we believe that such an impression, if existing, should be corrected. The only deduction allowed in the instant case was the deduction of shares of stock of corporations upon which a capital stock tax or tax on shares had been paid.

On page 16½ of the supplemental brief of the appellant it is stated that

> "* * * He (lower court Judge) held that the 9276 non-taxable Federal Reserve Bank shares were to be deducted 'flat' irrespective of whether or not they were a part of the capital structure of the trust company or purchased from its general fund. He had found as a fact that 5076 of the said total of 9276 shares had been purchased out of the general funds of the Provident Trust Company. (See certified copy of first opinion, p.

239a, par. 5; 40 Dauphin County Reports, p. 162, par. 5)."

As stated by the appellant the statement above referred to is both incorrect and confusing. Nowhere in the opinion of the lower court in the Provident Trust Company case does the court hold that the Federal Reserve Bank shares were to be deducted irrespective of whether or not they were a part of the capital structure of the trust company or purchased from its general fund. This is merely a deduction made by the appellant.

It is true that the lower court judge in the Provident Trust Company case did allow a flat deduction for investment in shares of stock of the Federal Reserve Bank from capital stock paid in, surplus and undivided profits, but we submit that in view of the following language used by the lower court judge in his opinion, to wit:

> "'We are, therefore, of opinion that we must reverse our former conclusion and now hold that this language prevents the taxation of so much of the shares of the defendant company as is invested in the stock of corporations which are relieved from the payment of a capital stock tax either because of some provision of an act of assembly or because they are beyond the power of the State to tax.'"

the allowance of a flat deduction for investment in Federal Reserve Bank shares was erroneous for the reason that such deduction was based upon the construction of the word "relieved" appearing in the taxing statute and upon the court's failure to require and consider upon the submission of proper proof

whether Federal Reserve Bank shares had been purchased out of capital stock paid in, surplus and undivided profits, as the court in the same case did require and consider proof of the purchase of national bank shares out of capital stock paid in, surplus and undivided profits allowing only a proportionate deduction for 150 shares of the Central National Bank and a flat deduction for 300 shares because the Provident Trust Company did not prove that the 150 shares had been purchased out of capital stock paid in, surplus and undivided profits.

It is the position of the Commonwealth that a "flat" deduction should be allowed under the taxing statute only where adequate proof is offered to show the purchase of investments out of capital stock paid in, surplus and undivided profits and that a proportionate deduction should be allowed for investments in the absence of such proof. We submit that this position of the Commonwealth is supported by the courts of the Commonwealth of Pennsylvania in the opinions in the Provident Trust Company case and in the opinions in the instant case and is recognized by the Justices of this Court in the dissenting opinion in the case of BANK OF CALIFORNIA NATIONAL ASSOCIATION *v.* RICHARDSON, 248 U. S. 476 (1919). Therefore, it is the Commonwealth's contention that the allowance of a proportionate deduction in the instant case for ownership by the Schuylkill Trust Company of shares of stock of the Philadelphia National Bank is proper and that the allowance of a flat deduction for ownership of Federal Reserve Bank shares by the lower court in the Provident Trust Company case was erroneous.

In order to clear up any possible confusion arising by reason of the discussion by the appellant in its supplemental brief, of the original opinion and the opinion upon the exceptions in the Provident Trust Company case, we wish to direct the court's attention to the fact that the sole effect of the opinion of the court upon the exceptions in the Provident Trust Company case as discussed by the appellant in its supplemental brief was to determine the method of arriving at the amount of deduction to be allowed for investment by the trust company in shares of stock of corporations owned by the trust company and upon which a tax had been paid. We submit, therefore, that the opinions of the lower court in the Provident Trust Company case on this point can have no bearing upon the Federal questions involved in the instant case.

On page 18½ of the supplemental brief for the appellant, the statement is made that

> "None of these cases (Commercial Bank *v.* Chambers, 182 U. S. 556 (1901), Amoskeag Savings Bank *v.* Purdy, 231 U. S. 373 (1913) and Bank of California National Association *v.* Richardson, 248 U. S. 476 (1919) are cited in support of a contention 'that in order to constitute a valid tax on shares of bank stock in the hands of shareholders, the tax need not be upon the shareholders' entire interest') sustains the contention in support of which they are cited by the Commonwealth. * * *"

We merely direct this court's attention to this portion of appellant's supplemental brief to show that appellant offers nothing in support of this statement. We submit that these cases do substantiate the principle for which they were cited.

The Commonwealth contends that the important question in this case is whether the Act of 1907, as amended, imposes a tax on the shareholders interest or a tax on the capital structure of the bank.

The appellate courts of Pennsylvania have, in many cases, cited in the original brief of the appellee and in the instant case decided that the tax in question is a tax on shares qua shares. The fact that deductions are permitted to shareholders by the taxing statute does not change the nature of the tax from a tax on shares in the hands of the shareholders to a tax on the corporation.

COMMERCIAL BANK *v.* CHAMBERS, 182 U. S. 556 (1901)

AMOSKEAG SAVINGS BANK *v.* PURDY, 231 U. S. 373 (1913)

BANK OF CALIFORNIA NATIONAL ASSOCIATION *v.* RICHARDSON 248 U. S. 476, (1919)

In these cases, this court has upheld the deduction to the shareholder of something which has been taxed to the bank. **In the instant case, the only deduction allowed has been that for shares which have paid a capital stock tax or a tax on shares.** Even if in the instant case a deduction had been permitted for shares of stock of corporations which had been relieved from the payment of a capital stock tax or tax on shares, how can it be said that the allowance of such an additional deduction changes the nature of the tax from a tax on shares to a tax on the corporation? This court has recognized that "the theory that shares in corpora-

tions are property entirely distinct and independent from the property of the corporation" and that "the tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself" and has so held in the following cases:

CLEVELAND TRUST COMPANY *v.* LANDER, 184 U. S. 111 (1902)

HOME SAVINGS BANK *v.* DES MOINES, 205 U. S. 503.

If the tax in the instant case is a tax on shares, there is no discrimination against United States securities owned by the bank by reason of the allowance of deduction to the shareholders of the bank for shares of stock of corporations which have paid a capital stock tax or tax on shares because of the theory of distinction between the interest of the shareholder and the interest of the corporation; and for the further reason that under this theory we are not concerned with what assets of the bank go to make up the capital stock, surplus and undivided profits used as the measure of the value of the shares of the bank to be taxed to the shareholders.

We, therefore, respectfully submit that the judgment of the court below should be affirmed.

CHARLES J. MARGIOTTI,
Attorney General.

MANUEL KRAUS,
EDWARD FRIEDMAN,
ROBERT L. MYERS, JR.,
Deputy Attorneys General.

p. 7 dissent

SUPREME COURT OF THE UNITED STATES.

No. 3.—October Term, 1935.

Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania. } Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[November 11, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant, a trust company organized under the laws of Pennsylvania, challenges a statute of the State as construed and applied in the assessment of a tax for the year 1930, denominated a tax on shares. From a settlement made against the company by the Department of Revenue an appeal was taken to the Court of Common Pleas of Dauphin County which, after trial without a jury, entered judgment in favor of the Commonwealth.[1] The Supreme Court of Pennsylvania affirmed the judgment.[2] The appellant's contention is that the Act as so construed and applied by the Department and the courts discriminates against United States Government bonds, bonds of Federal instrumentalities, and national bank stocks included in the appellant's assets. The appellee replies that the tax is upon the shares of stock as such and not upon the assets which represent their value; that, in fact, no tax whatever, much less a discriminatory tax, has been levied upon exempt assets of the company.

Prior to the year 1907 Pennsylvania trust companies were liable for what is known as a capital stock tax, levied upon the corporation. In the administration of that form of exaction certain securities, such as United States bonds and national bank shares, are eliminated from tax by deduction of their value from the value of the total assets of the corporations which own them. The deduction of exempt securities is made to avoid double taxation, the theory being that the shares issued by a corporation and its capital stock are identical so that taxation of the one is taxation of the other.[3]

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[1] 38 Dauphin County Reports, 22.
[2] 315 Pa. 429.
[3] *Com.* v. *Standard Oil Co.*, 101 Pa. 119, 145; *Com.* v. *Fall Brook Coal Co.*, 156 Pa. 488; *Com.* v. *Penna. R. R. Co.*, 297 Pa. 308, 314; *Com.* v. *Eastern Securities Co.*, 309 Pa. 44.

On June 13, 1907, the General Assembly adopted an act prescribing another method of taxation in the case of trust companies. Its pertinent provisions are copied in the margin.[4] This statute in terms lays a tax upon shares rather than upon corporate assets. The value of each share is to be ascertained by adding the value of capital stock paid in, surplus, and undivided profits, and dividing the total by the number of outstanding shares. Thus the exaction is measured by the value of the company's net assets. This involves the exclusion of corporate liabilities from the measure of value to which the rate is to be applied.[5] By successive amendments it was directed that the value of each share of stock should be ascertained by adding together *so much of* the amount of capital stock paid in, surplus, and undivided profits *as is not invested in the shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, or relieved from the payment of capital stock tax or tax on shares,* and dividing the sum by the number of outstanding shares.[6] These amendments were combined with the original act, in a single statute of April 25, 1929.[7]

Obviously the theory of the amendments was that as trust companies, so long as they had been liable for capital stock tax, had been exempted from payment of tax reckoned upon assets which had already paid a tax or were exempt from tax,—that is, the stock of corporations of Pennsylvania which had paid a capital stock tax or whose shares had been taxed or had been exempted from tax,—it was proper, in levying a tax upon the shares of trust companies reckoned upon the net assets of those companies, to exempt from such net assets so much thereof as represented shares of corporations which had already paid a tax or, under the policy of the Commonwealth had been exempted.

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[4] "Section 1. That from and after the passage of this act, every company . . . shall . . . make to the Auditor General a report in writing . . . setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. . . ."

[5] *Com.* v. *Trust Company*, 237 Pa. 353, 355, 356.

[6] Act of July 11, 1923, P. L. 1071-72. Act of May 7, 1927, P. L. 853, 855.

[7] P. L. 673. The Act of April 9, 1929, P. L. 343, Sections 807 and 1705, (the so-called Fiscal Code) did not alter the substance of the law but merely affected the executive agencies which were to administer it.

The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government.[a]

It will be observed that by the amendments to the Act of 1907 the measure of the tax is not in any sense the value of the shares as such but a value reflected by *so much* of the net assets as is not represented by shares of Pennsylvania corporations already taxed or exempt from tax. In the administration of the act as amended the procedure which has been followed and approved[b] is first to deduct the liabilities from the total assets, thus arriving at the net assets. The theory has been that exempt shares owned by the trust company must be shown to have been actually purchased out of capital stock or surplus in order to obtain a deduction of their full value from the gross assets. If the company is unable to demonstrate that they were purchased in that manner then a proportional method of deduction is adopted. This is to apply to the taxed value of all such exempt securities a fraction the numerator of which is the net assets and the denominator the gross assets. The result of applying this fraction to the taxed value of exempt shares is said to give the proportion of those exempt shares attributable to capital, surplus, and undivided profits, and the quotient is accordingly deducted from the value of the net assets to obtain the measure of the tax on all the shares, and this divided by the number of outstanding shares, gives the measure of the tax for each share. In the instant case the trust company held amongst its assets shares of Pennsylvania corporations, exempt from tax, of the value of $135,787. It also held shares of the Philadelphia National Bank of the value of $20,202. These were found by the Department of Revenue to have been taxed at a total taxable value of $71,373. Applying the fractional formula mentioned it was found that $8,886 of their taxable value should be attributed to capital, surplus and undivided profits, and deducted from the amount of the net assets. As the net assets had been ascertained to be $467,714 the deduction brought this figure down to $458,028 to which the rate of tax of five mills was applied.

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[a] *Van Allen* v. *Nolan*, 3 Wall. 573; *Cleveland Trust Company* v. *Lander*, 184 U. S. 111; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103.

[b] *Com.* v. *Haselwood Savings and Trust Company*, 271 Pa. 375.

It should be stated that under the Act the corporation is required to make a report as the basis for the calculation of the tax and, upon that report, the Department of Revenue settles the tax which is assessed against the corporation. The trust company, and not the stockholders, is liable in the first instance for the tax. Though given the right to pay the tax from its funds or to collect the amount from its stockholders, neither the company nor the Commonwealth is given any lien upon the stock for the amount of the tax. As the obligation to pay the Commonwealth is that of the company, its interest and its right to contest are beyond question.

In specifications of objection filed with its appeal from the tax settlement in the Court of Common Pleas the trust company insisted that all exempt shares (including the shares of the Philadelphia National Bank) should be deducted from the gross assets in full. This would exempt their full value rather than a proportion of their taxed value as ascertained by the use of the proportional method above described. The further objection was made that the method of settlement adopted resulted in discrimination against exempt securities issued by the United States or other Federal instrumentalities and that these should have been deducted at their full value from the gross assets before any computation of the tax. The Common Pleas Court overruled these objections (without discussing the treatment of the national bank shares), saying, with respect to United States bonds and like exempt securities, that as the tax was a tax upon shares, and not upon the assets of the trust company, those securities had not in fact been taxed. In affirming the judgment the Supreme Court of Pennsylvania said that as the specifications of objections had not covered the point as to national bank shares and the court below had not discussed that matter it was not open in the appellate court. As respects United States bonds, and other Federal securities, it concurred in the view of the lower court.

First. The appellant insists that as merely a portion of the net assets of the corporation is taken as the basis or measure of the tax it cannot be upon the shares as shares. The appellee relies upon the statement of the Supreme Court of Pennsylvania that the levy is upon the shares and not upon assets. The appellant asks us to find to the contrary. We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the state, but where a federal question is in-

volved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect.[10]

It is clear that the tax is not measured by each shareholder's aliquot proportion of all the assets of the company. If amongst those assets are found shares of stock of Pennsylvania corporations which, or whose shares, have been declared exempt by the State, this exemption is effected in the instant case by taking them wholly or partially out of the net assets which are the base for the tax. The appellant says this demonstrates that the tax is one upon assets. If the appellant is right the exaction operates as a discrimination against Government securities and other assets exempt under federal law. *Missouri* v. *Gehner*, 281 U. S. 313. If the tax is one truly upon that independent property evidenced by the ownership of a share of corporate stock its collection does not discriminate against United States securities.[11]

We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax. The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies

[10] *Senior* v. *Braden*, 295 U. S. 422, 429.
[11] See note 8, *supra*.

because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities.

Second. It is indisputable that the shares of stock of the Philadelphia National Bank owned by the appellant were included in the base or measure of the tax. It is undenied that these shares had been taxed to the trust company, as permitted by R. S. 5219, and in accordance with the applicable statutes of Pennsylvania;[12] and it must be conceded that having once been taxed to their owner, the trust company, they may not again be made the base or measure of a tax to that company's stockholders. *Bank of California* v. *Richardson*, 248 U. S. 476. The trial court seems to have excluded them upon the theory that they were not within the intent of the taxing statute, which the court thought meant to exempt only shares of Pennsylvania corporations which had been taxed or relieved from tax by local law. This view the trial court appears to have abandoned in a later case,[13] where it was held that stock of a federal reserve bank was within the meaning of the Pennsylania act and entitled to exemption. This later decision was affirmed by the Supreme Court of Pennsylvania.[14]

We are told that the matter is not open here for the reason that it was not raised on appeal to the Dauphin County court, was not discussed by that court, and consequently the Supreme Court refused to consider it. Whether the point was in fact raised in the court below is itself a federal question, and we are bound to examine the record to resolve it.[15] It appears that in the specifications of objection filed in Dauphin County court complaint was made that whereas there should have been a flat deduction of all shares of corporations theretofore taxed or exempted from tax, shares of the Philadelphia National Bank were included in shares granted only

[12]Act of July 15, 1897, P. L. 292, as amended by Act of April 25, 1929, P. L. 677.

[13]*Com.* v. *Provident Trust Co.*, 40 Dauphin County (Pa.), 146, 177.

[14]— Pa. —, 180 Atl. 16.

[15]*Carter* v. *Texas*, 177 U. S. 442, 447; *Ward* v. *Love County*, 253 U. S. 17, 22.

a proportional deduction. It further appears that in accordance with Pennsylvania practice, after the trial of the cause to the court without a jury the appellant submitted requests for conclusions of law. Amongst these were requests 10 and 16, which referred specifically to the Philadelphia National Bank stock, and severally requested the court to find (a) that these shares having been once taxed under another act, to the trust company as owner, could not be taxed a second time, and (b) that the failure to deduct the full value of the shares from the net assets of the trust company operated to discriminate and impose a tax upon the shares of stock in violation of R. S. 5219, they having once been taxed under another statute. The court answered both these requests in writing, "Refused". The refusal of the requests was made the subject of exceptions which quoted the requests and the answers of the court verbatim. The exceptions were overruled by the court and errors were assigned to the Supreme Court of Pennsylvania to the overruling of the exceptions applicable to the refusal of the requests in question, which were again quoted verbatim, with the answer of the court to the request and the overruling of the corresponding exception. In addition to these assignments of error the appellant in the statement of questions involved, required by the rules of the Supreme Court of Pennsylvania to be made a part of the brief on appeal, amongst others set forth the following question: "Are assets consisting of national bank shares to be eliminated from consideration in determining the taxable value to which the rate of tax is to be applied by deducting their actual value from the value of the net assets? Answer of the court below No."

We think that notwithstanding the Dauphin County court, in its opinion, failed to discuss this matter, as the Supreme Court of Pennsylvania points out, the question was sharply presented to that court and decided by it, and that the rights of the appellant were specifically preserved and pressed at every stage of the proceeding. We find, therefore, that the question is here for decision. It might well be disposed of by reference to what has already been said with respect to bonds of the United States and like securities. The discrimination here disclosed is, however, more obvious than in the case of the other securities mentioned. The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It ex-

empted them because to include them in the base would be in effect to tax them a second time. The shares of the Philadelphia National Bank had also been taxed pursuant to R. S. 5219, and if they were to be treated on an equal footing with shares of domestic corporations the State was bound to afford them a similar exemption from a second exaction.

Third. The appellant argues that if, as declared by the Supreme Court of Pennsylvania, the tax is one upon shares as such, it cannot be laid or collected by the Commonwealth in respect of 166 shares of stock of the appellant which by confession are owned by individuals citizens and residents of states other than Pennsylvania, for the reason that such shares have no taxable situs in Pennsylvania. In view of the grounds of our decision we find it unnecessary to pass upon this contention.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 3.—October Term, 1935.

Schuylkill Trust Company, Appellant,
vs.
The Commonwealth of Pennsylvania, Appellee.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[November 11, 1935.]

Mr. Justice Cardozo, dissenting.

I think the judgment under review is right in so far as it permits the inclusion of government bonds as factors of value in the assessment of the tax, and wrong only in so far as it violates a provision of Sec. 5219 of the United States Revised Statutes by the inclusion of shares in the Philadelphia National Bank.

The tax in controversy is not laid upon the capital of the trust company. It is laid upon the shares, payment being made in the first instance by the corporation as the agent of the shareholders with a remedy over for moneys so advanced. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 518; *Commonwealth* v. *Merchants' & Manufacturers' National Bank*, 168 Pa. 309; affirmed 167 U. S. 461; *Commonwealth* v. *Mortgage Trust Co.*, 227 Pa. 163; *Commonwealth* v. *Union Trust Co. of Pittsburgh*, 237 Pa. 353; *Northern Trust Co.* v. *McCoach*, 215 Fed. 991; cf. *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 444, 445. The tax being laid upon the shares, and not upon the capital, the Constitution does not make it necessary in the assessment of the tax to reduce the value of the shares to the extent that bonds of the national government are included in the capital. This is settled law. *Van Allen* v. *The Assessors*, 3 Wall. 573; *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 112; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 390.

The argument for the appellant is that the tax might have been lawful if the shares had been valued without any deductions growing out of the nature of the capital, but that the moment a deduction was allowed in respect of any class, there was an unlawful

discrimination against government securities unless the deduction was enlarged and made applicable to them. The attack is thus confined to amendments of the act which were placed upon the statute books in three years (1923, 1927, 1929), for there was no deduction of any kind under the act as first adopted in 1907. These amendments provide that the assessment shall be reduced by deducting therefrom (1) such part of the assets of the trust company as is invested in shares of other corporations taxed by the Commonwealth of Pennsylvania upon capital or shares (1923, July 11, P. L. 1071, 1072, reënacted by 1927, May 7, P. L. 853, 855; 1929, April 25, P. L. 673, 675), and (2) such part as is invested in the shares of other corporations relieved by the Commonwealth from a capital tax or a tax on shares (1927, May 7, P. L. 853, 855; 1929, April 25, P. L. 673, 675). The purpose of the first deduction is to avoid double taxation or something akin thereto. Cf. *Commonwealth* v. *Fall Brook Coal Co.*, 156 Pa. 488, 495; *Commonwealth* v. *Lehigh Coal & Navigation Co.*, 162 Pa. 603, 609. The purpose of the second is to promote the policy of the Commonwealth whereby particular kinds of business (i. e., the business of manufacturing corporations, laundering corporations and corporations for the processing and curing of meats) are relieved from the payment of taxes imposed on other corporations to the extent that the business so favored is carried on in Pennsylvania.* *Dupuy* v. *Johns*, 261 Pa. 40, 46.

At the time of the assessment the appellant was the owner of shares in corporations that paid a tax upon their capital to the Commonwealth of Pennsylvania. Purdon's Pennsylvania Statutes, Title 72, § 1871. These shares will be described for convenience as investments in class number 1. Except for certain shares in the Philadelphia National Bank, which will be separately considered,

*The following is the text of the statute which defines the corporations entitled to such relief:

"And provided further, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organized for laundering, for the processing and curing of meats, their products and by-products, or for manufacturing purposes, which is invested in and actually and exclusively employed in, carrying on laundering, the processing and curing of meats, their products and by-products, or manufacturing within the State, excepting companies engaged in the brewing or distilling of spirits or malt liquors, and such as enjoy and exercise the right of eminent domain; but every corporation, limited partnership, or joint-stock association organized for the purpose of laundering, or processing and curing meats, their products and by-products, or manufacturing, shall pay the

the assets did not include an interest in corporations that paid a tax upon their shares as distinguished from one upon their capital. The appellant was also the owner, or so it will be assumed, of shares of stock in manufacturing corporations that were relieved from any tax. These shares will be described for convenience as investments in class number 2. The holding now is that the deduction of the shares of either of these classes is an act of discrimination forbidden by the national constitution unless investments in obligations issued by the national government are accorded the same favor.

I read the cases otherwise. The statute was not passed as an act of "unfriendly discrimination" (*Adams* v. *Nashville*, 95 U. S. 19; *Mercantile Bank* v. *New York*, 121 U. S. 138, 161; *Aberdeen Bank* v. *Chehalis County*, *supra*, at p. 461) against the national securities, nor was it passed in aid of classes of investments with which the national securities are in substantial competition. In the absence of one or other of these motives or results the prejudice, if any, is too remote to be forbidden. There is no room in the solution of problems of this order for doctrinaire definitions, heedless of practical results. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523, 524. "In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other." *Metcalf & Eddy* v. *Mitchell*, *supra*, at p. 523. A sterile formalism would quickly lead to an impasse, the activities of the states checked because of an indirect effect upon the agencies of the federal government, and the federal activities checked for fear of a like effect upon the agencies of the states. One must view the subject in a large way if government is to go on at all. *Educational Films Corp.* v. *Ward*, *supra*, at p. 390 and cases there cited; *Pacific Co.* v. *Johnson*, 285 U. S. 480,

State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the laundering or manufacturing business, or the business of processing and curing meats, their products and by-products, in addition to the local taxes assessed upon its property in the district where located; it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the laundering or manufacturing plant and business, or the plant and business used in the processing and curing of meats, their products and by-products: Provided, further, In case of fire and marine insurance companies, the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock: Provided, That nothing in this act shall be so construed as to apply to building and loan associations chartered by the State of Pennsylvania." Purdon's Penn. Statutes, Title 72, § 1892.

489; *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466; *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226; *Helvering* v. *Powers*, 293 U. S. 214, 225.

"Unfriendly discrimination" might be inferred if securities of every kind were excluded from the reckoning with the single exception of the obligations of the national government. That would be an extreme case, the conclusion hardly doubtful. Even though hostility were not so pointed as in the case supposed, there might still be an invidious distinction if securities in substantial competition with evidences of indebtedness issued by the national government had been given a preferred position. Nothing of the kind appears. "For reasons of public policy and not as an unfriendly discrimination" (*Aberdeen Bank* v. *Chehalis County, supra*, at p. 461), the value of a share in a trust company is to be ascertained by excluding from the assets the shares in other corporations that are liable to the state for a tax upon their capital. Let it be assumed, for illustration, that a trust company is the owner of shares of stock in a department store doing business in Philadelphia. Under the statutes of Pennsyvania a business of that kind pays a tax upon its capital. A trust company does not. If it did, a hardship akin to that of double taxation would result if its interest in the department store were made use of to magnify its burden. But the process of taxation does not end at that point. By the plan of the statute the assessor passes over the trust company and lays the tax upon the shareholders. The same considerations of fair dealing and equality are then applicable to them. So at least the legislature of Pennsylvania might not unreasonably believe. Never before has it been held that out of deference or favor toward the securities of government a state is disabled from framing its system of taxation along lines of equity and justice. *Hepburn* v. *The School Directors*, 23 Wall. 480, 485.

What is true of investments in class number 1 is true also of investments in class number 2. "For reasons of public policy and not as an unfriendly discrimination" (*Aberdeen Bank* v. *Chehalis County, supra*), corporations organized for laundering, for the processing and curing of meats, and for manufacturing within the state have been relieved by Pennsylvania from liability for a tax upon their capital. The motive dictating that exemption is the desire to induce capital to come or stay within the state when employed in forms of enterprise believed to be important for the good of the

community. *Dupuy* v. *Johns, supra; Commonwealth* v. *Barnes Bros. Co.*, 5 Dauph. 75, 77; cf. *New York State* v. *Roberts*, 171 U. S. 658, 665, 666. In promotion of the same policy the shares of corporations thus relieved from liability for a tax are excluded from the reckoning when shareholders in trust companies are taxed upon the value of their holdings. The reckoning does not exclude the bonds or notes or other evidence of indebtedness of corporations of any kind, foreign or domestic. It does not exclude the shares of any corporation not engaged in the enumerated forms of business, except in so far as such other corporations have already paid a tax upon their capital or shares. It does not exclude the shares of manufacturing corporations except to the extent of the capital employed in Pennsylvania. The deduction is limited in range and beneficent in aim.

The situation, then, is this. Vast classes of securities—bonds and notes of every kind, as well as shares of stock in many and varied enterprises—are in the same position for the purpose of the tax in suit as government bonds and notes. The few investments that occupy a different position are not comparable in kind or in attractiveness to the obligations of the government and do not substantially compete with them. To hold that there was discrimination here in any forbidden sense is to hold that bonds and notes of the United States must be deducted from the value of the shares if there is a deduction of any form of investment, no matter how minute in amount or alien in quality. Assume, for illustration, an exemption of the shares of corporations engaged in the manufacture of books or in the sale of works of art, an exemption accorded in furtherance of a policy to foster art and letters. If the prevailing opinion stands, the policy in such a case must be abandoned or the federal bonds included. Assume again that laundering corporations only had been relieved by Pennsylvania from liability for a tax upon their capital. Laundering corporations, as we have seen, were actually relieved, but manufacturing corporations also. The prevailing opinion, if it stands, would bring us to a holding that laundering corporations could not be favored without hostility and peril to the treasury at Washington. This is to lose sight of the essence of discriminatory statutes and to stick in the bark of a hard and narrow verbalism.

From such incongruities and excesses the avenue of escape is

clear. It is to be found in the acceptance of the test put forward in this opinion. The discrimination, as has been said, must be so marked as to justify the inference that it was unfriendly in design or at the very least it must favor forms of investment that are in substantial competition with government securities. A helpful analogy is found in the taxation of national banks. By R. S. § 5219; 12 U. S. C. § 548, the several states may tax the shares of national banks, but "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." There are many cases in this court expounding that enactment. *Hepburn* v. *The School Directors, supra,* was a case where a statute of a state had given exemption from taxation to "all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate." The court assumed that the exempt investments might be ranked as moneyed capital. The tax upon the bank shares was none the less upheld. The exemption was partial only. "It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it." *Id.* at p. 485. There was no token of a hostile purpose. "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." *Ibid. Adams* v. *Nashville,* 95 U. S. 19, was a case where a municipal ordinance gave exemption from taxation to the municipal bonds. Again the ruling was that this exemption of particular property did not affect the validity of the tax upon the shares. "The plain intention of that statute [R. S. § 5219] was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power." *Id.* at p. 22. "It was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so." *Ibid. Mercantile Bank* v. *New York,* 121 U. S. 138, was a case where exemption had been given to bonds of municipal corporations and also to deposits in savings banks. Again the protest of discrimination was unavailing to defeat the tax. After quoting from *Hepburn* v. *The School Directors* and *Adams* v. *Nashville,* the court went on to say (p. 161): "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and

not operate as an unfriendly discrimination against investments in national banks." The same note is sounded in *Aberdeen Bank* v. *Chehalis County, supra.* Even though the investments subjected to a lighter tax are to be classed as moneyed capital, this is unavailing without more to condemn the classification as unlawful. Unless the favored moneyed capital is in substantial competition with the business of national banks, the preference is innocent in aim and harmless in result. At least, the harm, if any, is too remote and dubious to vitiate the tax. *First National Bank* v. *Hartford,* 273 U. S. 548, 552; *Minnesota* v. *First National Bank,* 273 U. S. 561, 568; *Georgetown National Bank* v. *Anderson,* 269 U. S. 341, 348; *First National Bank* v. *Tax Commission,* 289 U. S. 60, 65, 66; cf. *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310, 314, 315. The conclusion is even clearer where the investment may not properly be classified as moneyed capital at all.*

Two cases, *National Life Insurance Co.* v. *United States,* 277 U. S. 508, and *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, much relied upon by the appellant, are far beside the mark.

The first of these cases brought up a controversy as to a tax laid by ~~a state~~ Congress on the income of a life insurance company. The company was to be allowed (1) a deduction for tax exempt securities, and (2) an amount equal to 4% of its mean reserve fund, diminished, however, by the amount of the first allowance, the interest on government securities exempt under the federal law. The court held that the effect of the second allowance was to cancel the exemption conceded by the first.

The second of the two cases was one where in the view of a majority of the court a tax had been laid directly on the capital assets of the taxpayer and so on the government bonds included in the assets. It was not a case like this where the shares and not the capital were subjected to the burden.

I am unable for these reasons to discover an unlawful discrimination though the tax be assessed in accordance with the statute.

Assuming such a discrimination, I do not understand that any mandate is laid by this court upon the Supreme Court of Pennsylvania as to the choice between two methods of avoiding or correcting it.

*For other and less direct analogies see: Cumberland Coal Co. v. Board of Revision, 284 U. S. 23, 28; Iowa-Des Moines Bank v. Bennett, 284 U. S. 239, 245; Rowley v. Chicago & N. W. R. Co., 293 U. S. 102, 111.

The Acts of 1923, 1927 and 1929 prescribing the deductions, were amendatory statutes, separable, even though invalid, from the acts thereby amended. *Eberle* v. *Michigan*, 232 U. S. 700, 705; *Davis v. Wallace*, 257 U. S. 478, 484, 485; *Truax* v. *Corrigan*, 257 U. S. 312, 342.

If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 247. On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force. In that event the tax to be paid by the appellant will be increased instead of lessened. The choice between these curative measures must be made by the state court.

For reasons stated in *Bank of California* v. *Richardson*, 248 U. S. 476, the assessment is excessive to the extent that it includes shares of stock of the Philadelphia National Bank belonging to the Trust Company. These shares having been taxed to the Trust Company as owner could not properly be taxed again to a shareholder of the owner. *Bank of California* v. *Richardson, supra*; R. S. § 5219.

Other questions are in the case, but they are not decided in the prevailing opinion, and will not be considered here.

The judgment should be modified by directing the deduction from the assessment of the value of the appellant's shares in the Philadelphia National Bank, and as modified affirmed.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.